Form No. 7

San Francisco
Law Library

No. 76636

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

1086

No. 2950

United States Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH J. SCOTT, as Collector of Internal Revenue of the United States for the First Collection District of California,

Appellant,

vs.

WESTERN PACIFIC RAILROAD COMPANY, and FRANK G. DRUM and WARREN OLNEY, JR., Receivers of the Property of the WESTERN PACIFIC RAILWAY COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2950

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH J. SCOTT, as Collector of Internal Revenue of the United States for the First Collection District of California,

Appellant,

vs.

WESTERN PACIFIC RAILROAD COMPANY, and FRANK G. DRUM and WARREN OLNEY, JR., Receivers of the Property of the WESTERN PACIFIC RAILWAY COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 169—IN EQUITY.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Order Fixing Time for Hearing Petition for Rulings in Regard to Income Tax.

Upon reading and filing the petition of Frank G. Drum and Warren Olney, Jr., Receivers in the above-entitled matter,—

IT IS ORDERED that the said petition be heard on Monday, the 29th day of May, 1916, at the hour of ten o'clock A. M. of said day, and that a citation issue out of and under the seal of this court directed to Joseph J. Scott, as Collector of Internal Revenue, to be and appear before this Court, to show cause why he should not accept the return of annual net income heretofore filed by said receivers; and further to show cause, if any he has, why this Court should not make and enter its judgment and decree finding and adjudging that the interest due and unpaid by the Western Pacific Railway Company for the fiscal year 1915 should not be held to be a proper deduction and that the said receivers are not

subject to the payment of any tax upon their income as such receivers.

Dated May 16th, 1916.

WM. C. VAN FLEET,
United States District Judge.

(Attached hereto is petition for rulings in regard to income tax.)

Receipt of a true copy thereof this 18 day of May, 1911, is hereby admitted.

PERRY EVANS,
Attorney for Def.

[Endorsed]: Filed May 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [1*]

In the District Court of the United States, Northern District of California, Second Division.

EQ.—No. 169.

EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY, a Corporation, et al.,

Defendants.

---

*Page-number appearing at foot of page of original certified Transcript of Record.

Memorandum Opinion.

JARED HOW, for Plaintiff.

ALEXANDER R. BALDWIN, for Defendants.

JOHN S. PARTRIDGE and GARRET W. McENERNEY, for the Receivers.

VAN FLEET, District Judge:

The question presented by the application of the receivers herein for instructions of the Court is whether the fund in the hands of the receivers, represented by the net proceeds in conducting the operations of the road while in their hands over and above the expense and authorized expenditures paid out by them, is subject to tax under the Federal Income Tax Act as net earnings of the corporation, and as such required to be returned by them to the Collector of Internal Revenue of this district for the purposes of such tax.

I am of opinion that the facts bring the case within the principles of Pennsylvania Steel Co. vs. New York City Railway Co., 198 Fed. 775; and upon the authority of that case it is held that such fund is not subject to the tax.

The receivers will be governed accordingly, and an appropriate order to that end may be prepared by the attorney for the receivers and entered herein. [2]

[Endorsed]: Filed August 21, 1916. Walter B. Maling, Clerk. [3]

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 21st day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 169—EQUITY.

THE EQUITABLE TRUST CO.

vs.

WESTERN PACIFIC RAILWAY CO. et al.

Order Instructing Receivers That No Payment of Any Income Tax Should be Made, etc.

The receivers' application for instructions of the Court in regard to income tax, heretofore submitted, being fully considered and the Court having filed its memorandum opinion, it is ordered that the receivers are instructed that no payment of any income tax should be made. Ordered that the order to show cause on the Collector of Internal Revenue be dismissed. [4]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Petition for Appeal Filed December 14, 1916, in the Southern Division of the Northern District of the State of California.

To the Honorable WILLIAM C. VAN FLEET, District Judge, etc.

Joseph J. Scott, Collector of Internal Revenue of the United States, for the First Collection District of California, defendant, feeling himself aggrieved by the order made and entered in this cause on the 21st day of August, 1916, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issued, as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to

the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

JNO. W. PRESTON,
United States Attorney,
ED. F. JARED,
Asst. United States Attorney,
Solicitors for Defendants.

[Endorsed]: Filed Dec. 14, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Assignment of Errors Upon Appeal from Order Made and Entered on August 21, 1916.

And now on this, the 14th day of December, 1916, come the defendant by his solicitor, Ed. F. Jared, Assistant United States Attorney, and says that the order entered in the above cause on the 21st day of August, 1916, is erroneous and unjust to defendant.

I.

The Court erred in not dismissing the Petition for

Ruling in regard to Income Tax.

II.

The Court erred in assuming jurisdiction of the matter by substituting its judgment or discretion for that of the official entrusted by law with its execution.

III.

The Court erred in taking jurisdiction of the matter, as to whether the funds in the receivers' hands were subject to the income tax, as Congress has provided a way in which taxpayers may obtain relief from unjust assessment or from an illegal collection of taxes. [6]

IV.

The Court erred in holding that the funds in the hands of the receivers, represented by the net proceeds in conducting the operations of the road while in their hands, over and above the expense and authorized expenditures paid out by them was not subject to tax under the Federal Income Tax Act as net earning of the corporation.

V.

The Court erred in holding that the returns of the annual net income of the Western Pacific Railway Company for the year 1915, in the sum of $1,408,-034.99 filed by the receivers of the company, were not subject to the Federal Income Tax Act.

VI.

The Court erred in holding and instructing the receivers that no payment of any income tax should be made.

WHEREFORE the appellant prays that the said

order be reversed and that the said District Court for the Northern District of California, be ordered to enter a decree or order reversing the decision of the lower Court in said cause.

JNO. W. PRESTON,
United States Attorney,
ED. F. JARED,
Asst. United States Attorney,
Solicitors for Appellant.

[Endorsed]: Filed Dec. 14, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Order Allowing Appeal.

On motion of Ed. F. Jared, Assistant United States Attorney, solicitor and counsel for Joseph J. Scott, Collector of Internal Revenue of the United States, for the First Collection District of California, defendant,—

IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit

of the United States from the order and decree heretofore filed and entered herein, on August 21, 1916, be, and the same is hereby allowed, and that a certified transcript of the record relating to the said order and decree be forthwith transmitted to the said Circuit Court of Appeals.

Decemebr 14, 1916.

WM. C. VAN FLEET,
District Judge, Second Division.

December 14, 1916.

[Endorsed]: Filed Dec. 14, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Statement of Proceedings on Motion to Dismiss the Petition for Rulings in Regard to the Income Tax in the Above-Entitled Matter.

BE IT REMEMBERED that on June 26, 1916, the motion of Joseph J. Scott, Collector of Internal Revenue, to dismiss the Petition filed by the re-

ceivers in the above-styled case, for the Court Rulings in the Income Tax, came on for hearing, Ed. F. Jared, Assistant United States Attorney, appearing on behalf of Joseph J. Scott, and John S. Partridge, appearing on behalf of the petitioners; thereupon the following proceedings were had:

Mr. Partridge presented and read to the Court the Petition for Rulings in Regard to Income Tax, which petition was, and is in the words and figures as follows:

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 169—IN EQUITY.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants. [9]

Petition for Rulings in Regard to Income Tax.

The petition of Frank G. Drum and Warren Olney, Jr., respectfully shows:

I.

That they are the duly appointed, qualified and acting receivers of the property of the Western Pacific Railway Company, one of the defendants in the above-entitled cause.

II.

That within the time allowed by law, your receivers filed, in accordance with law, with the Collector of Internal Revenue for this District, their income tax return, showing total gross income for the year ending December 31, 1915, of $6,669,577.64, and total deductions of $9,955,781.59. That said deductions were made up as follows:

Expenses General	$4,786,203.45
Losses Sustained	35,056.13
Depreciation	95,760.41
Interest	4,694,238.94
Taxes Domestic	344,522.66
Total	$9,955,781.59

III.

That attached to said return was an explanatory note showing the facts in regard to the said interest deduction, as follows:

"WESTERN PACIFIC RAILWAY COMPANY, FRANK G. DRUM & WARREN OLNEY, JR., RECEIVERS.

6 (a) Interest Deductible.

Name or Kind of Obligation.	Amount of Principal.	Rate of Interest.	Amount of Interest.
First Mtge. Bonds	$50,000,000.00	5%	$2,500,000.00
Second " "	25,000,000.00	5%	1,250,000.00
Notes issued to D. & R. G. R. R. Co. prior to January 1st 1915	15,400,452.89	5%	770,022.64
Prior to January 1st.	75,000.00	6%	4,500.00
" " " "	2,285,096.73	7%	159,956.77
During year 1915	162,819.94	7%	9,759.53
	$92,923,369.56		$4,694,238.94

Above interest due on indebtedness (all forms) of Western Pacific Railway Company, a corporation,

but no payments have been actually made inasmuch as the amount available for that purpose, viz.: $1,408,034.99, and which would have been used for such purpose by the Western Pacific Railway Company is held in abeyance and is subject to disposition by order of the United States District Court in and for the Northern District of California, said Court being the [10] Court appointing receivers of the property of Western Pacific Railway Company."

IV.

That after said income tax return had been forwarded to the Treasury Department, the said Treasury Department made its ruling as follows:

"TREASURY DEPARTMENT,
WASHINGTON.

CT—In re. March 29, 1916.
1916 Return
Western Pacific Railway Co.
Joseph J. Scott, Esq.,
Collector of Internal Revenue,
San Francisco, California.

Sir:

This office is in receipt of your letter of the 22d instant, with which you forward return of annual net income of the Western Pacific Railway Company for the year 1915, filed by the receivers of the company, in order that a special ruling may be made as to the deduction 6 (a) "Interest paid."

In reply you are informed that the memorandum attached to the return explains the interest deduction of $4,694,238.94 as follows:

'Above interest due on indebtedness (all forms) of Western Pacific Railway Company, a corporation, but no payments have been actually made inasmuch as the amount available for that purpose, viz.: $1,408,034.99, and which would have been used for such purpose by the Western Pacific Railway Company is held in abeyance and is subject to disposition by order of the United States District Court in and for the Northern District of California, said Court being the Court appointing Receivers of the property of Western Pacific Railway Company.'

From the above explanation, this office holds that no part of the interest deduction is allowable, as an allowable deduction for interest must represent the interest accrued and paid within the year for which the return is made. Such deductions must be confined to actual disbursements, in cash or its equivalent, that the liabilities discharged have been paid within the year.

Therefore, the interest deduction of $4,694,238.94 will be disallowed, and, as the return shows a deficit of $3,286,203.95, tax will be assessed on $1,408,034.99.

The return will be retained in this office and in the event you receive this letter before forwarding your March list, you should report the corporation for assessment on that list, otherwise it should be reported on your April list.

Respectfully,

(S.) W. H. OSBORN,

Commissioner." [11]

V.

That your receivers are advised and believe, and therefore allege, that the said interest is properly deductible and that your receivers should not be compelled to pay any tax upon the surplus inasmuch as said surplus is less than the amount of the interest due and payable during the said fiscal year, and inasmuch as the said interest was not paid on account of the receivership.

WHEREFORE, your receivers pray that a citation issue out of and under the seal of this Court directed to Joseph J. Scott, Collector of Internal Revenue, directing him to appear before this Court upon a day to be set, then and there to show cause why the said statement should not be accepted; and your receivers further pray that this Court make and enter its judgment and decree finding that the said interest is a proper deduction and that your receivers should not be held to pay any income tax.

F. G. DRUM,
Petitioners.

JOHN S. PARTRIDGE,
Counsel for Petitioners.

State of California,
City and County of San Francisco,—ss.

Frank G. Drum, being first duly sworn, deposes and says: That he is one of the petitioners in the above-entitled cause; that he has read the foregoing petition and that the same is in all respects true.

FRANK G. DRUM.

Subscribed and sworn to before me this 16th day of May, 1916.

[Seal] W. T. HESS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Whereupon Mr. Jared presented and read the motion to dismiss the said petition, which reads as follows. [12]

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Motion to Dismiss Petition for Rulings in Regard to the Income Tax.

To F. G. Drum and Warren Olney, Jr., Petitioners, and John S. Partridge, Counsel for Petitioners, San Francisco, Cal.:

Take notice that upon the petition filed herein, the Collector of Internal Revenue of this District, by the United States Attorney, will on Monday, June 26, 1916, at 10 o'clock A. M., or as soon thereafter as

said counsel can be heard, at the courtroom of the above-entitled Court, move the said Court to dismiss the "Petition for Rulings in Regard to the Income Tax," filed in this cause with the proceedings had thereon, because it appears on the face of the Petition that this Court has no jurisdiction in said matter, for that:

First. The Court has been asked to make rulings that have been made by executive officers relative to matters which are confided to them by law;

> "The Courts will refuse to substitute their judgments or discretion for that of the official entrusted by law with its execution. Interference in such case would be to interfere with the ordinary function of government."
>
> La vs. McAdoo, 234 U. S., p. 634.

Rulings made by an executive department in pursuance of authority delegated by Congress have the force of law.

> Wilkins vs. U. S., 96 F. 837.
>
> Caha vs. U. S., 152 U. S. 211.
>
> Ex parte Reed, 100 U. S. 13.
>
> 22 Op. Atty. Gen., 570.

Scope and effect of regulations of the Department,

> In re Kollock, 165 U. S. 526.
>
> 43 Int. Rev. Rec. 170.

Second. That it appears on the face of the Petition that the interest due and unpaid by the Western Pacific Railway Company for the fiscal year 1915 is not a proper deduction; **[13]** that no part of this interest deducted is allowable, as allowable deduction must represent the interest *accrued and*

paid within the year for which the return is made. Such deductions must be confined to actual disbursements in cash or its equivalent.

Section B, line 23–25 and Section G, line 96—
of the Federal Income Tax Law.

JNO. W. PRESTON,
United States Attorney.
ED F. JARED,
Asst. United States Attorney.

The matter was fully argued by counsels, and thereupon the Court ordered that the matter be submitted.

That on August 21, 1916, a Memorandum Opinion of the said Court was made and filed, and thereupon an order was made and entered; the said Memorandum Opinion and order are as follows:

In the District Court of the United States, Northern District of California, Second Division.

EQ.—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY, a Corporation, et al.,

Defendants.

Memorandum Opinion.

JARED HOW, for Plaintiff,

ALEXANDER R. BALDWIN, for Defendants,

JOHN S. PARTRIDGE and GARRET W. McENERNEY, for the Receivers.

VAN FLEET, District Judge.

The question presented by the application of the receivers herein for instructions of the Court is whether the fund in the hands of the receivers, represented by the net proceeds in conducting the operations of the road while in their hands over and above the expense and authorized expenditures paid out by them, is **[14]** subject to tax under the Federal Income Tax Act as net earnings of the corporation, and as such required to be returned by them to the Collector of Internal Revenue of this district for the purposes of such tax.

I am of the opinion that the facts bring the case within the principles of Pennsylvania Steel Co. vs. New York City Railway Co., 198 Fed. 775; and upon the authority of that case it is held that such fund is not subject to the tax.

The receivers will be governed accordingly, and an appropriate order to that end may be prepared by the attorney for the receivers and entered herein.

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 21st day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 169—EQUITY.

THE EQUITABLE TRUST CO.

vs.

WESTERN PACIFIC RAILWAY CO. et al.

The receivers' application for instructions of the Court in regard to income tax, heretofore submitted, being fully considered and the Court having filed its memorandum opinion, it is ordered that the receivers are instructed that no payment of any income tax should be made. Ordered that the order to show cause on the Calendar of Internal Revenue be dismissed. [15]

The above statement contains all of the evidence and proceedings relating to the hearing of the above matter.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the Receivers of the Western Pacific Railway Company and the Western Pacific Railway Company, and Joseph J. Scott, Collector of Internal Revenue, that the foregoing statement has been presented in time, and

that it be approved, allowed and settled by the Judge of the above-entitled court as correct in all respects, and that the same shall be made part of the record of the said case on appeal as required by Rule 75 of the Equity Rules of the Supreme Court of the United States;

AND IT IS FURTHER STIPULATED AND AGREED that the order of approval of said statement may be made outside of the jurisdiction of the above-entitled court.

Dated March 9, 1917.

JNO. W. PRESTON,
U. S. Attorney.
ED F. JARED,
Asst. U. S. Atty.,
Attorneys for Joseph Scott, Collector of Internal Revenue.

JOHN S. PARTRIDGE,
Attorney for Receiver of Western Pacific Railway Company.

A. R. BALDWIN,
Attorney for Western Pacific Railroad Company.

Order Approving and Settling Statement.

The foregoing statement, duly proposed and agreed upon by the counsels for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein for the purpose of appeal.

Dated March 10th, 1917, at San Francisco, Cal.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed Mar. 10, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[16]**

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

CLERK'S OFFICE.

IN EQUITY—No. 169.

THE EQUITABLE TRUST CO. OF NEW YORK

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please prepare certified copies of the following papers to be used on the appeal from the order made and entered in the above-entitled matter on August 21, 1916:

1. Order fixing time for hearing petition for Rulings in Regard to Income Tax.
2. Memorandum Opinion.
3. Order made and entered August 21, 1916.
4. Petition for Appeal from order, etc., of August 21, 1916.
5. Order Allowing Appeal.
6. Assignment of Errors.
7. Citation on Appeal.
8. Statement of the proceedings to be used on appeal.
9. Copy of this praecipe.

ED F. JARED,
Asst. U. S. Atty.,
Attorney for Defendant.

Service of the within Praecipe by copy admitted this 15th day of Jan., 1917.

JOHN S. PARTRIDGE,
Attorney for Receivers.
A. R. BALDWIN,
Atty. for the Western Pacific R. R. Co.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[17]**

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 169—IN EQUITY.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing seventeen (17) pages, numbered from 1 to 17, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the

same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record amounts to $9.40; that said sum will be charged by me in my quarterly account against the United States, for the quarter ending March 31, 1917, and that the original citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 12th day of March, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. **[18]**

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Western Pacific Railroad Company and Frank G. Drum and Warren Olney, Jr., Receivers of the Property of the Western Pacific Railway Company, and John S. Partridge, Counsel for Receivers, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's

Office of the United States District Court for the Southern Division of the Northern District of California, 2d Division thereof, wherein Joseph J. Scott, Collector of Internal Revenue of the United States, for the First Collection District of California, is appellant, and you are appellee, to show cause, if any there be, why the order, judgment and decree rendered against the said appellant on August 21, 1916, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Southern Division of the Northern Dist. of California, 2d Div. thereof, this 14th day of December, A. D. 1916.

WM. C. VAN FLEET,
United States District Judge. **[19]**

State of California,
City and County of San Francisco,—ss.

David D. Jones, being duly affirmed, deposes and says: That he is, and was at the time of the service of the attached citation on appeal, a citizen of the United States, over the age of eighteen years; and that he personally served the above-mentioned citation on the Western Pacific Railway Company by leaving with A. R. Baldwin, Vice-president of said company, a copy of such citation at his office in the Mills Building.

DAVID D. JONES.

Subscribed and sworn to before me this 18th day of December, 1916.

[Seal] J. A. SCHAERTZER,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: In Equity—No. 169. Southern Division, United States District Court for the Northern District of California, Second Division. Joseph J. Scott, Collector of Internal Revenue, 1st Collection Dist. of California, Appellant, vs. Western Pacific Railroad Co. Frank G. Drum and Warren Olney, Jr., Receivers, and John S. Partridge, Counsel for Receivers. Citation on Appeal. Filed Dec. 16, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2950. United States Circuit Court of Appeals for the Ninth Circuit. Joseph J. Scott, as Collector of Internal Revenue of the United States for the First Collection District of California, Appellant, vs. Western Pacific Railroad Company and Frank G. Drum and Warren Olney, Jr., Receivers of the Property of the Western Pacific Railway Company, Appellees. Transcript of the Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed March 12, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. 169.

JOSEPH J. SCOTT, Collector of Internal Revenue,
Appellant,

vs.

FRANK G. DRUM and WARREN OLNEY, Jr., Receivers of the WESTERN PACIFIC RAILWAY COMPANY et al.,
Appellees.

Order Extending Time to and Including February 13, 1917, to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that the appellant in the above-entitled cause may have to and including February 13, 1917, within which to file the record on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 12, 1917.

WM. C. VAN FLEET,
United States District Judge, Northern District of California.

[Endorsed]: In Equity—No. 169. In the United States Circuit Court of Appeals for the Ninth Circuit. Joseph J. Scott, Collector of Internal Revenue, vs. Frank G. Drum and Warren Olney, Jr., Receivers of the Western Pacific Railway Company, et al. Order Extending Time to File Record and

Docket Cause. Filed Jan. 12, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. 169.

JOSEPH J. SCOTT, Collector of Internal Revenue, Appellant,

vs.

FRANK G. DRUM and WARREN OLNEY, Jr., Receivers of the WESTERN PACIFIC RAILWAY COMPANY et al., Appellees.

Order Extending Time to and Including February 13, 1917, to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that the appellant in the above-entitled cause may have to and including February 13, 1917, within which to file the record on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 13, 1917.

W. W. MORROW,

Judge for the Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: In Equity—No.——. In the United States Circuit Court of Appeals for the Ninth Circuit. Joseph J. Scott, Collector of Internal Revenue, vs. Frank G. Drum and Warren Olney, Jr., etc. Order Extending Time to File Record and Docket Cause. Filed Jan. 13, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Appellant,

vs.

FRANK G. DRUM and WARREN OLNEY, Jr., Receivers of the WESTERN PACIFIC RAILWAY COMPANY, et al.,

Appellees.

Order Extending Time to and Including March 12, 1917, to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that the appellant in the above-entitled cause may have to and including March twelfth, 1917, within which to file the record on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 13th, 1917.

W. W. MORROW,

Judge, Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Joseph J. Scott, Collector of Internal Revenue, Appellant, vs. Frank G. Drum et al., Receivers of the Western Pacific Railway Co. et al., Appellees.

Order Extending Time to File Record and Docket Case. Filed Feb. 13, 1917. F. D. Monckton, Clerk.

No. 2950. United States Circuit Court of Appeals for the Ninth Circuit. Joseph J. Scott, as Collector, etc., Appellant, vs. Western Pacific Railroad Company, et al., etc., Appellees. Three Orders Under Rule 16 Enlarging Time to March 12, 1917, to File Record Thereof and to Docket Case. Refiled Mar. 12, 1917. F. D. Monckton, Clerk.

No. 2950

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH J. SCOTT, as Collector of Internal Revenue of the United States for the First Collection District of California,

Appellant,

vs.

WESTERN PACIFIC RAILROAD COMPANY; and FRANK G. DRUM and WARREN OLNEY, JR., Receivers of the Property of the WESTERN PACIFIC RAILWAY COMPANY,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

JOHN W. PRESTON,
United States Attorney,

ED F. JARED,
Asst. United States Attorney,
Attorneys for Appellant.

Filed this ..... day of ....., 1917.

FRANK D. MONCKTON, Clerk,

By ....., Deputy Clerk.

NEAL PUBLISHING CO., PRINT., SAN FRANCISCO.

No. 2950.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH J. SCOTT, as Collector of Internal Revenue of the United States for the First Collection District of California,

Appellant,

vs.

WESTERN PACIFIC RAILROAD COMPANY, and FRANK G. DRUM and WARREN OLNEY, JR., Receivers of the Property of the WESTERN PACIFIC RAILWAY COMPANY,

Appellees.

BRIEF FOR APPELLANT

I.

STATEMENT OF THE CASE.

This is an appeal from a final order made and entered the 21st day of August, 1916, in the case of The Equitable Trust Company of New York as Trustee, complainant, vs. Western Pacific Railway Company, et al., defendants, relative to the Rulings

of the Court, as to whether the funds in the hands of the Receivers of the Western Pacific Railway Company, represented by the net proceeds in conducting the operations of the road are subject to tax under the Federal Income Tax Act.

The Receivers of the Western Pacific Railway Company filed a return of its net income for 1915 in accordance with the Income Tax Law, Act of October 3, 1913, which return showed no taxable income. It appeared to the Treasury Department that certain deductions from the gross income received were not actually paid and said deductions were disallowed, and the Company was assessed an income tax of $14,080.35 (Trans. pp. 12-13).

A petition was filed by the Receivers of the said Company in the above entitled cause asking for Rulings in regard to the said assessment, making Joseph J. Scott, Collector of Internal Revenue of the United States, for the First Collection District of California, defendant, (hereinafter designated appellant) (Trans. p. 10).

The appellant moved to dismiss Petition for Rulings in Regard to the Income Tax, upon the ground that the Court had no jurisdiction or authority to substitute its judgment or discretion for that of the official entrusted by law with its execution; That the Court had no right to set aside a ruling made by an officer of the executive department in pursuance of authority delegated by Congress; That their

remedy was an appeal to the executive department having charge of the assessment and collection of the tax. (Trans. p. 15).

Upon hearing of the said motion, the Court was of the opinion that the funds in the hands of said Receivers were not subject to tax under the Federal Income Tax Act, nor were the said Receivers required to make a return of said earnings of the said Company, while in their hands as Receivers for the purpose of such tax, basing the opinion within the principles of *Penn. Steel Co.* vs. *N. Y. City Railway Co.,* 198 Fed. 775 (Trans. p. 3) and thereupon ordered that the Receivers be instructed that no payment of any income tax should be made (Trans. p. 4).

SPECIFICATIONS OF ERRORS.

II.

1. The Court erred in not dismissing the Petition for Ruling in regard to Income Tax.

2. The Court erred in assuming jurisdiction of the matter by substituting its judgment or discretion for that of the official entrusted by law with its execution.

3. The Court erred in taking jurisdiction of the matter, as to whether the funds in the receivers' hands were subject to the income tax, as Congress has provided a way in which taxpayers may ob-

tain relief from unjust assessment or from an illegal collection of taxes.

4. The Court erred in holding that the funds in the hands of the receivers, represented by the net proceeds in conducting the operations of the road while in their hands, over and above the expense and authorized expenditures paid out by them was not subject to tax under the Federal Income Tax Act as net earning of the corporation.

5. The Court erred in holding that the returns of the annual net income of the Western Pacific Railway Company for the year 1915, in the sum of $1,408,034.99 filed by the receivers of the company, were not subject to the Federal Income Tax Act.

6. The Court erred in holding and instructing the receivers that no payment of any income tax should be made.

ARGUMENT.

III.

There seem to be only two questions that arise in this case that are necessary for consideration. First: the question of jurisdiction; Second: whether income received during the taxing year from the property of a corporation held and operated during the entire year by its receivers, is subject to taxation under the Income Tax Act.

It would seem that the Court exceeded its jurisdiction when it entertained the right to substitute

its judgment for that of the Collector of Internal Revenue, by overruling his decision and instructing the receivers that no payment of any income tax should be made.

Section 3224 R. S. provides that

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court",

and Section 3226 R. S. provides that

> "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive, or in any manner wrongfully collected, until an appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of the law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein."

If the receivers were dissatisfied with the assessment it was their duty under the law to appeal to the Executive department having charge of the assessment and collection of the tax, and if such decision was unfavorable to them, it was their duty to pay the tax and resort to their remedy in law;

> *Frost on Federal Corporation Tax Law,* Section 149,

Cheatham vs. *Norwell,* 92 U. S. p. 85 at p. 88,

Taylor vs. *Secor,* 92 U. S. p. 575 at p. 613.

The Court of Appeals of the District of Columbia, in the case of *Moore* vs. *Miller,* Vol. 5, of Appeal Cases, p. 428, said:

> "It is familiar law that courts of equity are always adverse to interfere with the collection of taxes; that they will never attempt to restrain the execution of tax law merely because of an illegality, hardship or irregularity of the tax complained of, and in the only instance that such court would interfere is where the party has no adequate remedy at law."

The Court further said that

> "It is apparent from an examination of the Act (referring to an Income Act) that many of the duties imposed by it upon the Commissioner of Internal Revenue, with respect to the tax on income, are of such a nature as involve the exercise of discretion by that officer in their performance. Among others is the decision of the manifold questions that most constantly arise as to the construction of points under the law, and the determination of appeals from collectors; which decisions are declared to be final, so far at least as the office is concerned. That discretionary duties of this character devolved on a public officer are not controlled by mandamus or by the writ of injunction, in some respects a correlative remedy, is common knowledge; and yet the present application would result in substituting the opinion of the court

as the guide of that official discretion, in case it did not go to the further extent of nullifying the entire provision as to the tax on incomes."

The Court, speaking on page 432 of the same case, said:

"The regulation of remedies rests entirely with the legislature, subject only to the limitation that some substantial mode of redress is left to the citizen. The Act of 1867 (Section 3224 R. S.) was evidently intended to prevent the ruinous consequences that might result to the credit or even the existence of the Government, if the courts everywhere on the application of different persons had full authority to restrain all proceedings under the laws to collect its revenues. The mischiefs to the whole country that might result are obvious to all; they are strongly set forth by Mr. Justice Field in *Davis* v. *United States,* 11 Wall. 113, and by Mr. Justice Miller in *Cheatham* vs. *United States,* 92 U. S. 89."

The Supreme Court said, speaking through Mr. Justice Miller, in the case referred to above, *Taylor* vs. *Secor*:

"The Government of the United States has provided, both in the Customs and in the Internal Revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the Executive departments. If the party aggrieved does not obtain satisfaction in this mode there

> are provisions for recovering the tax after it has been paid by suit against the collecting officer. But there is no place in this system for an application to a Court of Justice until after the money is paid."

In the case of *Louisiana* vs. *McAdoo,* 234 U. S. p. 634, where the Court had been asked to overrule the decision of the Secretary of Treasury, relative to the tariff rates on sugar, the Court said:

> "By statute originally enacted in 1792 (1 Stat. at L. 280, chap. 37), now Par. 249, Revised Statutes (U. S. Comp. Stat. 1901, p. 137), it is expressly provided that the Secretary of the Treasury is to 'superintend the collection of customs duties as he shall think best'. His interpretation of any custom law is made conclusive and binding upon all officers of customs, and upon his successors, until reversed by judicial decision. Rev. Stat. Par. 2652, U. S. Comp. Stat. 1901, p. 1821; act March 3, 1875 (18 Stat. at L. p. 469, chap. 136, Par. 2 U. S. Comp. Stat. 1901, p. 137). In the discharge of his duties, semijudicial in character, the Secretary of the Treasury is, by statute, entitled to the opinion of the Attorney General, which, as we may judicially know, was obtained in this matter. Opinion of the Attorney General, Feb. 14, 1914, Vol. 30, p.—.
>
> There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one

> having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government."

The next question is—are the funds in the hands of the receivers representing net earnings of the corporation subject to the income tax?

The record shows (Trans. pp. 11-12-13) that the receivers, in making their income tax return for the year ending December 31, 1915, deducted from the gross income $4,694,238.94 as interest due, when as a matter of fact, they only had $1,408,034.99 available to pay such amount and that the said available amount was in their hands at the time the assessment was made. The Collector of Internal Revenue held that no part of the interest was allowable, as allowable deductions must represent interest accrued and paid within the year for which the return is made. Such deductions must be confined to actual disbursements in cash, or its equivalent.

> Section B, lines 23-25 and Sec. G line 96 of the Federal Income Tax Law.

It was said by the Supreme Court in the case of *Cheatham* vs. *Norvekl*:

> "That all governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them."

Could it be conceived that Congress in enacting the Income Tax Act intended that millions of dollars in the hands of receivers of corporations, which in lots of cases are making big net earnings, should be shielded from such taxation?

It would be logical to assume that if the receivers in this case had paid the said amount that was available to its bondholders, the funds would not have escaped from taxation. If the theory is true that funds in the hands of the receivers are exonerated from the Income Tax, a creditor could well advise the debtor to delay payment for the purpose of defeating the tax.

His Honor, Judge Van Fleet, said in his opinion (Trans. p. 3):

> "I am of the opinion that the facts bring the case within the principles of *Pennsylvania Steel Company* vs. *New York City Railway Company,* 198 Fed. 775, and upon authority of that case it is held that such fund is not subject to the tax."

We do not think that this case is applicable to the present one, for the Pennsylvania Steel Company case was an interpretation of the Corporation Tax Act of 1909, in which the Court said it was a special

excise tax upon doing business in a corporate capacity; that individuals and partnerships were not subject to such a tax.

In that case the corporation had become insolvent, had lost its functions as a corporation by being placed in the hands of a receiver, and by losing its corporate capacity it was no longer obligated to pay such a privilege tax. This case, and others of like nature, was appealed to the Supreme Court, title of the case, *United States* vs. *Whitridge,* 231 U. S. p. 144.

The Court said that the tax was an excise or privilege tax and not in any sense a tax upon a property or upon income, merely as income; that the tax was imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate business.

IV.

CONCLUSION.

In view of the premises, we respectfully submit that the order herein should be reversed.

JOHN W. PRESTON,
United States Attorney,

ED. F. JARED,
Asst. U. S. Attorney.
Attorneys for Appellant.

No. 2950

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

3

JOSEPH J. SCOTT, as Collector of Internal Revenue of the United States for the First Collection District of California,

Appellant,

vs.

WESTERN PACIFIC RAILROAD COMPANY, and FRANK G. DRUM and WARREN OLNEY, JR., Receivers of the Property of the WESTERN PACIFIC RAILWAY COMPANY,

Appellees.

BRIEF FOR APPELLEES

A. R. BALDWIN,
Attorney for Appellees,
932 Mills Building,
San Francisco, Cal.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2950

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH J. SCOTT, as Collector of Internal Revenue of the United States for the First Collection District of California,

Appellant,

vs.

WESTERN PACIFIC RAILROAD COMPANY, and FRANK G. DRUM and WARREN OLNEY, JR., Receivers of the Property of the WESTERN PACIFIC RAILWAY COMPANY,

Appellees.

BRIEF FOR APPELLEES.

Statement of Facts

The question involved in this case is whether the income derived from the operation by Receivers of the property of the Western Pacific Railway Company is liable to income tax under the Act of Congress. The Commissioner of Internal Revenue held that the corporation, Western Pacific Railway Company, should be reported for assessment and also that the interest which had accrued on its funded

indebtedness should not be deducted from operating income because the same had not been actually paid (Trans. p. 13).

On May 18th, 1916, Frank G. Drum and Warren Olney, Jr., the Receivers appointed in an action pending in the District Court of the United States in and for the Northern District of California, Second Division, entitled *The Equitable Trust Company of New York, plaintiff,* vs. *Western Pacific Railway Company, et al., defendants,* petitioned said Court in reference to the question of the payment of income tax under the provisions of the Act of Congress approved October 3rd, 1913. (38 Stat. at L. 166, Ch. 16; Comp. Stat. 1913 Secs. 6319-36) (Trans. pp. 10-14). The prayer of the petition asked that a citation issue out of said Court directed to Joseph J. Scott, Collector of Internal Revenue, directing him to appear before that Court and show cause why the statement theretofore filed with the said Collector should not be accepted, and further praying that the Court make its order finding that certain interest which was included in the statement so filed was a proper deduction, and further that an order should be made that the Receivers should not be held to pay any income tax (Trans. p. 14). The record does not disclose whether the citation was ever issued, but it does appear that the matter came on to be heard before the Honorable District Court on June 26th, 1916 (Trans. pp. 9-10), when the said Joseph J. Scott, Collector of Internal Revenue, moved to dismiss the petition filed by the Receivers (Trans. pp. 15-17).

The record is again silent as to whether any action was taken by the Court on the Collector's motion to dismiss the petition of the Receivers. On August 21st, 1916, the Court made an order instructing the Receivers that no payment of any income tax should be made, which order is in the following words:

> "The receivers' application for instructions of the Court in regard to income tax, heretofore submitted, being fully considered and the Court having filed its memorandum opinion, it is ordered that the receivers are instructed that no payment of any income tax should be made. Ordered that the order to show cause on the Collector of Internal Revenue be dismissed." (Trans. p. 4.)

This is the only order which the Court made, either on the petition or on the motion of the Collector to dismiss the petition, and is the order from which the said Joseph J. Scott, as Collector of Internal Revenue, appeals,—he having filed in the said District Court on December 14th, 1916, a petition addressed to the Honorable Wm. C. Van Fleet, Judge of the United States District Court in and for the Northern District of California, in which he recited that, "* * * feeling himself aggrieved by the order made and entered in this cause *(The Equitable Trust Company of New York* vs. *Western Pacific Railway Company, et al.)* on the 21st day of August, 1916, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit, * * *". (Trans. p. 5.) On the same day the District Court made an order allow-

ing such appeal "* * * from the order and decree heretofore filed and entered herein, on August 21st, 1916." (Trans. p. 9.)

Except as modified by the above statement, the facts as presented in the statement of the case in the Appellant's brief are substantially correct.

Argument.

In discussing this case, we will do so under the following heads:

1st. The Court had jurisdiction on petition of Receivers appointed by it, to direct the Receivers that no income tax should be paid by them.

2nd. The Act of Congress of October 3rd, 1913, in relation to the levy, assessment and collection of income tax does not require receivers of a corporation appointed by a court to make an income tax return.

3rd. Even if this Court should determine that the Act of Congress approved October 3rd, 1913, required receivers of a corporation to make a return of the income derived through their operation of the property of the corporation, still such receivers should deduct from the income derived from such operation the interest which accrued on the indebtedness of the corporation whose property was being operated by the Court through its receivers and this notwithstanding that such interest had not actually in fact been paid.

I.

Did the lower Court have jurisdiction to make its order appealed from?

It is contended by the Appellant that the Court exceeded its jurisdiction in issuing its instruction to its own Receivers because it was in effect in violation of Section 3224, Revised Statutes (Comp. Stat. 1916, Sec. 5947), which provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The petition of the Receivers to the Court which appointed them (Trans. pp. 10-14) and the order of the Court directing that its Receivers should not pay any income tax (Trans. p. 19) seem sufficient in and of themselves to refute the proposition that this in any sense could be taken to be a suit to restrain the assessment or collection of a tax.

In the first place, the Receivers appointed by the Court are officers of that Court in the administration of the property which is in the hands of the Court. *Quincy M. & P. R. Co.* vs. *Humphreys,* 145 U. S. 82, at page 98; 36 L. Ed. 632, at page 637; *International Trust Co.* vs. *Decker Bros.* (9th C. C. A.) 152 Fed. 78 at page 82; 11 L. R. A. N. S. 152, at page 156; High on Receivers, Sec. 1; *Reardon* vs. *Youngquist* 189 Ill. App. 3 at page 12. Receivers, therefore, being officers of the Court, can and should make inquiry of the Court for instructions regarding the administration of the property in their hands. *Missouri Pac. Ry. Co.* vs. *T. & P. Ry. Co.,* 31 Fed. 862;

Chable vs. *Nicaragua C. C. Co.,* 59 Fed. 846; *People ex rel. Attorney General* vs. *Security L. Ins. Co.,* 79 N. Y. 267, at page 270; High on Receivers, Sec. 188; Foster, Federal Practice, Sec. 310; *Grant* vs. *Phoenix L. Ins. Co.,* 121 U. S. 118, 30 L. Ed. 909; *Schwartz* vs. *Keystone Oil Co. (Pa.),* 25 Atl. 1018; *Weeks* vs. *Cornwell (N. Y.),* 13 N. E. 96.

The case of *Ex Parte Chamberlain,* 55 Fed. 704, arose on the petition of a receiver of the property of a railway company asking the protection of the Court to prevent the enforcement of the payment of certain local taxes. The Court said:

> "There can be no doubt that property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, and municipal, as any other property. Persons cannot, by coming into this court, and, for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen. For this reason receivers in this district pay all just and lawful taxes without asking or needing the sanction of the court, and in their accounts such payments are passed without question. But, on the other hand, receivers are not bound to pay a tax in their judgment unlawful, without the order of the court; and when they consider the legality of the tax questionable it is their right—their manifest duty—to apply to the court either for instruction or protection. Especially is this the case when the question arises between the receiver and persons in the state, county, and municipal government as to the proper construction to be given to the law, upon which individuals may well differ, and it is his right and manifest duty to go to

> the court, whose creature he is, for instruction. He therefore pursued the proper course when he came in by this petition."

The Court then proceeded to consider the validity of the tax in question and, after citing authorities which held it invalid, said:

> "When, therefore, the receiver comes into this court and asks instructions, predicating his action on the decision in this case, we grant him relief by suspending the collection of the tax until the presumption of the soundness of this decision has been overcome."

This same case was taken to the United States Supreme Court under the title *Ex Parte Tyler,* 149 U. S. 164, 37 L. Ed. 689, the Court, speaking through Mr. Chief Justice Fuller, said:

> "And when controversy arises as to the legality of the tax claimed there ought to be no serious difficulty in adjusting such controversy upon proper suggestion. The usual course pursued in such cases is by intervention *pro interesse suo,* as in the instance of sequestration. The tax collector is a ministerial officer, and no reason is perceived why he should not bring his claim to the attention of the court, while on the other hand it is clearly the duty of the receiver to do so, if he contends that the taxes are illegal. If found valid, they must be paid; if invalid, the court will so declare, subject to the review of the appellate tribunals."

In *Ledoux* vs. *LaBee,* 83 Fed. 761, a receiver requested instructions of the Court as to the validity of certain local taxes imposed on the property in his

hands. The Court, in sustaining its jurisdiction of the controversy, said:

> "this court, having possession of the property and assets of the Harney Peak Company through its receiver, has jurisdiction to inquire into the legality of any claim sought to be enforced against it, or the legality and lawfulness of any invasion of said possession, independent of any grounds of equitable jurisdiction, which must exist in other cases."
>
> * * * "This action, brought by the receiver, is therefore properly instituted, and in such form as to allow the legality of the claim for taxes for the payment of which the property has been seized to be determined."
>
> * * * "There can be no doubt of the correctness of the doctrine that property in the possession of a receiver appointed by a court is in *custodia legis,* and that unauthorized interference with such possession is punishable as a contempt; and it cannot be contended that this salutary rule has any exceptions in favor of officers engaged in the collection of taxes." * * *
>
> "The legality of the claim for taxes will now be considered."

This method was pursued in the case of *Pennsylvania Steel Company* vs. *New York City Railway Company,* 176 Fed. 477, 193 Fed. 286, affirmed in 198 Fed. 775, where the receivers had petitioned the Court appointing them to determine whether they should pay the income tax under the Act of Congress of 1909. (Act of Aug. 5, 1909, Sec. 38, 36 Stat. at L. 112, Ch. 6, Comp. Stat. 1913, Secs. 6300-2.) That same case went to the Supreme Court of the United

States under the title of *United States* vs. *Whitridge,* 231 U. S. 144; 58 L. Ed. 159.

See also

Spencer vs. *Babylon R. Co.,* 233 Fed. 803.

In the case of *Brushaber* vs. *Union Pacific Railroad Company,* 240 U. S. 1, 60 L. Ed. 493, a stockholder of the defendant corporation brought an action against that corporation to restrain it from paying the income tax under the Act of Congress of October 3rd, 1913. The defendant corporation refused to defend the action and the Government, through the United States Attorney General, contested the action brought by the stockholder and, among other defenses made, sought to dismiss the action on the ground that the same was, in effect, an action to restrain the assessment or collection of a tax forbidden by Sec. 3224 R. S. The Court in the decision held that the contention that the lower Court had no jurisdiction in the cause was without merit and entertained the action and decided the question on the merits.

We again call the attention of this Court, in order to emphasize the position that we take, to the order made in the lower Court from which the appeal is taken (Trans. p. 4). It does not purport to restrain the Collector of Internal Revenue from assessing or collecting the income tax, but, on the other hand, dismisses the citation which it had previously directed to be issued to the Collector to show

cause why the return made by the Receivers should not be accepted and affirmatively directs its own Receivers not to pay any income tax whatever. In other words,—the property of the Western Pacific Railway Company being in the hands of the United States District Court and being operated by the Court through Receivers appointed by it—the Court, when the question was presented as to whether or not the income tax under the Act of Congress of 1913 should be paid, made its order that no income tax whatever should be paid from its operation through its Receivers. This then was not only *not* a suit for the purpose of restraining the assessment or collection of a tax, but was simply an adjudication by the Court that its Receivers were not liable for the payment of the tax. In the same way the United States Supreme Court in *Brushaber* vs. *Union Pacific Railroad Company, supra*, decided that the defendant corporation in a suit by one of its stockholders was liable for the payment of this same tax. This, we believe, disposes of any question relative to the jurisdiction of the Court in making its order appealed from.

II.

Does the Act of Congress approved October 3rd, 1913, apply to receivers of corporations?

We respectfully submit at the outset that the Act under which the income tax is purported to be imposed must be strictly construed.

In *Pennsylvania Steel Co.* vs. *New York City Railway Co.* (2nd C. C. A.), 198 Fed. 774, the Court laid down the following rule as the basis for its holding that the income tax Act of 1909 did not apply to receivers:

> "The act in question, levying, as it does, a tax upon the citizen, must be strictly construed; it cannot be enlarged by construction to cover matters not clearly within its purport. The question is not what Congress might have done or should have done, but what it actually did do. When this is ascertained the duty of the court is accomplished."

In *Mutual Benefit Life Ins. Co.* vs. *Herold,* 198 Fed. 199, in construing the same Act, it was said:

> "At the outset it may be remarked that a statute providing for the imposition of taxes is to be strictly construed, and all reasonable doubts in respect thereto resolved against the Government and in favor of the citizen."

In *Treat* vs. *White,* 181 U. S. 264, 45 L. Ed. 853, the same rule was expressed in the following language:

> "It is also true, as said by this court in *United States* vs. *Isham,* 17 Wall. 496, 504, 21 L. Ed. 728, 730: 'If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr* vs. *Scudds,* 11 Exch. 191, " a tax cannot be imposed without clear and express words for that purpose".' With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer."

In *Eidman* vs. *Martinez,* 184 U. S. 578, 46 L. Ed. 697, the United States Supreme Court again followed the same rule of construction:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception confining the operation of duty (citation) though the rule regarding exemptions from general laws imposing taxes may be different (citations)."

> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language."

The reason for this rule of construction in the interpretation of taxing statutes has been thus expressed by Lord Cairns in *Partington* vs. *The Attorney General,* L. R. 4 E. & I. App. Cas. 100, at page 122:

> "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other

> words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The same rule has been applied by this Circuit Court of Appeals in the case of *Lynch* vs. *Union Trust Co.* (9th C. C. A.) 164 Fed. 161, where the Court, in interpreting the legacy tax Act of 1898, said:

> "Primarily in this connection it is necessary to keep in view a cardinal principle, to be applied generally to the interpretation of legislation whereby the Government seeks to impose a duty or burden upon the property or rights of the citizen in the nature of taxation, and more especially applicable to statutes such as this, seeking to impose a burden of a special or unusual character, and that is that, in all cases of doubt or ambiguity arising on the terms of such a statute, every intendment is to be indulged against the taxing power. This principle has been aptly stated in two cases involving the application of the statute under consideration: *Eidman* vs. *Martinez,* 184 U. S. 578, 583, 22 Sup. Ct. 515, 46 L. Ed. 697; *Disston* vs. *McClain,* 147 Fed. 114, 116, 77 C. C. A. 340."

This Court will note that the income tax is included in an Act of Congress approved October 3rd, 1913, and entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for Other Purposes." The first part of this Act deals entirely with tariff matters, and, in Section II, imposes the so-called "income tax." This Section II is divided into several subheads running from A to

N, both inclusive. Headings A to F, inclusive, deal with income tax imposed on individuals and heading G, with its several paragraphs, deals with the income tax imposed upon corporations. Headings H to N, inclusive, are general in their nature and pertain to the administration of the Act itself.

Nowhere in heading G is the word "receiver" used, but it does contain an elaborate scheme for the assessment and return to be made by "every corporation, joint stock company or association and every insurance company organized in the United States." This is the same expression used in the income tax law of August 5th, 1909, wherein, in Section 38 of that Act, it is provided that "every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business." Nowhere in the Act of August 5, 1909, was the word "receiver" used.

In the case of *Pennsylvania Steel Company* vs. *New York City Railway Company,* 176 Fed. 477, which arose under the Act of 1909, the Court said:

> "The Act contains no provisions as to receivers, and it is not thought that Congress intended to include bankrupt corporations with no net income whose properties are being administered by a court. It would seem to be sufficient if at the time fixed for making re-

> turns a statement be filed with the proper officer showing that these roads are in the hands of receivers."

This case came on for rehearing, 193 Fed. 286, where the Court said:

> "It does not seem to me that Congress, while avoiding carefully any taxation of the property of the corporation, intended to impose a tax upon the income realized from the assets of a bankrupt corporation, whose property had been taken over by a court, through its officers to be marshaled and distributed. Certainly the language used does not indicate any such intent."

On appeal before the Circuit Court of Appeals for the Second Circuit, 198 Fed. 774, the Court, speaking through Circuit Judge Coxe, said:

> "We are of the opinion that the Act is inapplicable to receivers for the following reasons:
>
> First—The taxation of business done and income received by receivers is not contemplated by the Act, receivers are not mentioned. This omission cannot be attributed to inadvertence. The lawmakers unquestionably understood the situation; they knew that corporations frequently become bankrupt and are placed in the hands of receivers and yet no provision in the Act relates to this contingency."
>
> * * * "Whatever the reason may have been, the fact remains that the doing of business by receivers in their representative capacity, as officers of the court, is not taxed by the Act and no provision is made therein for the ascertainment and collection of such a tax."

> "* * * It cannot be held that an Act which nowhere mentions receivers and which in every paragraph deals with corporations and joint-stock companies actually engaged in business, can, by construction, be made to cover the business, temporarily undertaken, of conserving the property of such a corporation for the benefit of its creditors and the public."

In the case of the *United States* vs. *Whitridge*, 231 U. S. 144, 58 L. Ed. 159, which grew out of the same receivership, Mr. Justice Pitney said:

> "A reference to the language of the Act is sufficient to show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income.
>
> And we are unable to perceive that such receivers are within the spirit and purpose of the Act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads, and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate

management and control, with the accompanying advantages and privileges.

Without amplifying the discussion, we content ourselves with saying that, having regard to the genesis of the legislation, the constitutional limitation in view of which it was evidently framed, the language employed by the lawmaker, and the reason and spirit of the enactment, all considerations alike lead to the conclusion that the Act of 1909 did not impose a tax upon the income derived from the management of corporate property by receivers, under such conditions as are herein presented."

As illustrative of the intent of Congress in intentionally omitting to provide for the filing of an income tax return by the receivers of a corporation under the Act of October 3rd, 1913, we call particular attention to the income tax law of September 8th, 1916, which, in Part II, Section 10 of the Act, provides for the levy, assessment and collection of a tax on the total "net income received in the preceding calendar year from all sources by every corporation, joint stock company, or association, or insurance company, etc." (39 Stat. at L. 765, Ch. 463; Comp. Stat. 1916, Sec. 6336j) in the same way that the Act of 1913 imposed a tax on the net income on the same entities. But, while the Act of 1913 entirely omits any reference to receivers of corporations, Congress has, in the Act of 1916, expressly shown its intention to include receivers. For, in Subdivision (c) of Section 13 of Part II of the Act of 1916, it is provided:

"(c) In cases wherein receivers, trustees in bankruptcy, or assignees are operating the prop-

> erty or business of corporations, joint-stock companies or associations, or insurance companies, subject to tax imposed by this title, such receivers, trustees, or assignees shall make returns of net income as and for such corporations, joint-stock companies or associations, and insurance companies, in the same manner and form as such organizations are hereinbefore required to make returns, and any income tax due on the basis of such returns made by receivers, trustees, or assignees shall be assessed and collected in the same manner as if assessed directly against the organizations of whose businesses or properties they have custody and control (39 Stat. at L. page 771, Comp. Stat. 1916. Sec. 6336-m (c)).

It was the lack of a corresponding section to this in the Act of 1909 which persuaded the Circuit Court of Appeals in *Pennsylvania Steel Co.* vs. *New York City Railway Company (supra)* to declare that it was not the intention of Congress to include receivers of corporations among those who were required to return and pay an income tax, and it is the lack of a corresponding provision to the one above quoted from the Act of 1913 which persuades us to believe that Congress had no intention whatever of imposing the income tax upon receivers of corporations.

If the intent of Congress, under the Act of 1913, had been to include receivers, there is no reason why the amendatory Act of 1916 should have expressly provided that which Congress in the Act of 1913 had intentionally included—in other words, if the language of the Act of 1913 applied to receivers

of corporations, the same language could have been used in the Act of 1916 without the express reference to receivers therein.

It is true that the word "receiver" is used twice in the headings of Section 2 of the Act which relate to the imposition of income taxes on individuals, and is found in headings D and E thereof. Under heading D we find "guardians, trustees, executors, administrators, agents, *receivers,* conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income *of the person for whom they act, subject to this tax* coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals." "This tax" is the *tax* imposed on individuals referred to under the preceding headings and the *"person* * * * subject to this tax" is a person who is required to make a return and who is defined as a "person of lawful age * * * having a net income of $3000, or over * * *" (heading D). Such person is authorized under heading C of the Act to "deduct from the amount of the net income * * * the sum of $3000 plus $1000 additional if the person making the return be a married man with a wife living with him" etc. We are mentioning this to draw attention to the fact that this heading which refers to receivers applies to the "individual" and not to a "corporation."

Under heading E "receiver" is again used, viz.: "All persons, firms, copartnerships, companies, cor-

porations, joint stock companies or associations and insurance companies, in whatever capacity acting, including lessees or mortgagors of real or personal property, trustees in any trust capacity, executors, administrators, agents, *receivers,* conservators, employers and all officers and employees of the United States having the control, receipt, custody, disposal or payment of interest, rent, salaries, wages * * * are hereby authorized and required to deduct and withhold * * * such sums as will be sufficient to pay the normal tax imposed thereon by this section." In other words, under heading D, those acting in a fiduciary capacity for an individual shall make a return for the individual subject to the tax for whom they (fiduciaries) act, and the same fiduciaries are required by the Act under heading E to withhold at the source the normal tax imposed on the individual and pay to the proper officer of the Government the amounts so withheld.

III.

But if this Court should conclude that the Act of 1913 did apply to Receivers of corporations, then the question arises, viz.:

Should the receivers of a corporation deduct from gross income, interest on the funded indebtedness of the corporation whose property they are controlling and which had accrued but which could not be paid?

It appears from the petition of the Receivers that they filed with the Collector of Internal Revenue in

their district a statement showing the income derived from operation during the year ending December 31st, 1915, and that the gross amount so received was $6,669,577.64. From this they showed deductions in the sum of $9,955,781.59 which included the item of interest amounting to $4,694,238.94 which was shown in tabulated form as having accrued on the amount of funded debt owing by the Western Pacific Railway Company. As explanatory as to why this interest was not paid, the Receivers stated:

> "Above interest due on indebtedness (all forms) of Western Pacific Railway Company, a corporation, but no payments have been actually made inasmuch as the amount available for that purpose, viz.: $1,408,034.99, and which would have been used for such purpose by the Western Pacific Railway Company is held in abeyance and is subject to disposition by order of the United States District Court in and for the Northern District of California, said Court being the Court appointing receivers of the property of Western Pacific Railway Company." (Trans. pp. 11, 12.)

It would seem obvious that the mere fact of the receivership of the railroad company took away the power to pay the interest on obligations of the corporation which had lost control of its property. The Receivers were not acting for the corporation, but were acting for the Court in a suit brought by the creditors of the corporation.

Any apparent net income in the hands of the Court could not be used for the payment of interest until the Court had determined what its debts might

be in the administration of the property through its Receivers. In this case the difference between the deductions, other than interest, and the gross income derived from the operation of the railroad during the year amounted to $1,408,034.99, but this sum in receivership could not be used as the basis by the Court of a *net income* within the meaning of the Act of Congress inasmuch as it was subject at all times to the debts which the Court might incur and which in fact had been incurred, although not paid, and which of necessity could not be determined until the receivership was closed and all expenses had been liquidated. *United States* vs. *Jones,* 236 U. S. 106; 59 L. Ed. 488.

Again, the income derived during the operation of receivership cannot be considered as income in the sense that it might be if the same amount had resulted from the operation by a corporation, inasmuch as such income formed part of the corpus of the property in the hands of the Court upon which the lien of the creditors existed and which would pass, after expenses of receivership and administration had been deducted, to the purchaser of the property under foreclosure.

The Receivers, therefore, in making the return stated that the $1,408,034.99 which would have been applicable for interest at the hands of the corporation and which they stated would have been used for the purpose of payment of interest by the Western Pacific Railway Company, was held in

abeyance and was subject to disposition by order of the Court which had appointed the Receivers. How long the Court would hold the fund in abeyance and when the Court would order its disposition or for what purposes, could not be told until the termination of the receivership and the final judgment in the cause in which the Receivers were appointed.

Where the Court has restrained a person from doing an act, such person cannot be penalized for failure to do that which he is not permitted to do.

It is true that the Act of 1913 allowed a corporation to make a deduction on account of interest, only where such interest had not only accrued but also had been paid during the year for which the return was made. But while the interest on the obligation of the corporation in this case continued to accrue notwithstanding the receivership, the receivership proceeding put it out of the power of the corporation (which had lost control of its property) to pay the interest which had so accrued. On the other hand, the Receivers, from the very nature of their appointment, had no power to pay such interest on behalf of the corporation. We have then, in this case, the anomalous situation of the Commissioner of Internal Revenue directing the Collector to report for assessment the Western Pacific Railway Company, the corporation, on an income which was derived, not through the operation by the corporation, but through Receivers of

the Court in whose custody, control and management the property of the corporation rested. At the same time the Commissioner of Internal Revenue denied the right of the corporation to deduct an interest charge which had accrued against it on its funded debt but which it had no power to pay.

It is respectfully submitted, therefore,—

1st—That the Court had the jurisdiction to entertain the petition of its Receivers and, therefore, had the jurisdiction to make the order of August 21st, 1916;

2nd—That the Act of Congress of October 3rd, 1913, did not require receivers of corporations to pay income taxes derived from the operation of the property of the corporation by the Court through its receivers;

3rd—That, even if it should be held that the Act of Congress above referred to does apply to receivers of corporations, still the interest on the obligations of the corporation can be deducted from the gross income notwithstanding that it had not been actually paid.

It is submitted that the Order of the lower Court should be affirmed.

Respectfully submitted,

A. R. Baldwin,
Attorney for Appellees.

No. 2951

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Plaintiff in Error,

vs.

PETER SANDBERG and MATILDA SANDBERG, His Wife,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2951

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Plaintiff in Error,

vs.

PETER SANDBERG and MATILDA SANDBERG, His Wife,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index.

Names and Addresses of Attorneys.

WILLIAM C. BRISTOL, Esquire, 504 Wilcox Building, Portland, Oregon,

ELLIS LEWIS GARRETSON, Esquire, 319 Fidelity Building, Tacoma, Washington,

Attorneys for the Plaintiff in Error.

CHARLES O. BATES, Esquire, 1107 National Realty Building, Tacoma, Washington,

CHARLES T. PETERSON, Esquire, 1107 National Realty Building, Tacoma, Washington,

Attorneys for the Defendants in Error.

[1*]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1605.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

PETER SANDBERG and MATHILDA SANDBERG, His Wife,

Defendants.

Praecipe for Transcript of Record.

Filed February 21, 1917.

To the Clerk of the Above-named Court:

You will please prepare and certify to constitute the record on appeal in the above-entitled case type-

*Page-number appearing at foot of page of original certified Transcript of Record.

written copies of the following papers, omitting all captions, excepting on the first page, omitting also all verifications, acceptances of service and other endorsements, excepting filing marks, said transcript of the record to be forwarded to and filed in the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to be printed there according to the rules of said Circuit Court of Appeals:

Original complaint.

Answer of the defendants as first filed.

Motion against that answer.

Order on ruling of Court on motion against that answer.

Reply of the plaintiff to the answers of the defendants.

Separate answer of Mathilda Sandberg filed at the time of trial .

Stipulation to try the case to the Court.

Stipulation about the exhibits.

Various orders for extension of time.

Bill of exceptions.

Findings of fact requested by the plaintiff.

Order denying these findings of fact.

Findings of fact requested by the defendants.

Exceptions of the plaintiff to the findings of fact as made by the Court.

Findings of fact as made by the Court. [2]

Judgment order and decree as made by the Court.

Stipulation about the exhibits and the order *or* the Court thereon for their transmission to the Circuit Court of Appeals.

Decision of the Court on the merits.

The petition for writ of error.
Order allowing the same.
Bond thereon.
Assignments of errors.

W. C. BRISTOL,
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 21, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [3]

Complaint.

To the Honorable Judges of the Above-entitled Court:

The complaint of American Surety Company of New York exhibited by its attorneys thereunto authorized, against Peter Sandberg and Mathilda Sandberg, husband and wife, doth respectfully show, allege and represent:

Par. I.

That American Surety Company of New York is and was at all the times herein set forth a corporation created, organized and existing under and by virtue of the laws of the State of New York; that its principal office and place of business is and has been at all the times herein set forth in the city and State of New York; that it is authorized to do business in the State of Washington and is a duly licensed surety company in said State; that it is now a citizen and resident of the State of New York and not a citizen or resident of the State of Washington.

Par. II.

That Peter Sandberg and Mathilda Sandberg are husband and wife and both of them were at all the times herein mentioned and are now citizens and residents of the State of Washington and not of the State of New York and reside and have their fixed domicile in the city of Tacoma in the county of Pierce in the said State of Washington. [4]

Par. III.

That the plaintiff and the respective defendants are citizens and residents of different states and not of the same state.

Par. IV.

That the amount or value in controversy in this cause, exclusive of interest and costs, is more than the sum of three thousand dollars.

Par. V.

That Wells Construction Co. was at the times herein set forth a corporation created, organized and existing under the laws of the State of Washington and registered in British Columbia under the British Companies Act with a registered office in Vancouver in the Province of British Columbia, with its principal office and place of business in the city of Tacoma and State of Washington, and upon the 2d day of June, 1910, through its secretary, Joe Wells, made an application in words and figures as follows, to wit, for a correct bond as therein specified:

F. Reamended. 16M, 9'09.

Form C.

State—Vancouver, B. C.

Agency—F. B. Lewis.

AMERICAN SURETY COMPANY.
of New York.

A. No. 78

Bond No. 797682

Capital and Surplus, $5,500,000.

APPLICATION FOR CONTRACT OR BID BOND.

Amount—$25,000.00

NOTE—These should accompany this application:

1. Financial Statement, Form C 413 with schedules. [5]
2. Copy of Contract, or in case of a bid, of advertisement, instruction and bid showing date and signatures. (Copy contract to follow.)
3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Company's Office
Building
100 Broadway, N. Y.

Premium $875.00

Place and Date
of this
Application.

Vancouver, B. C.
(Place)
June 2nd, 1910.
(Date)

To American Surety Company of New York:

Application is hereby made for a bond of suretyship, as follows:

1. Name, age, business address and residence. In the case of a partnership add name and residence of each partner; in the case of a corporation add names and residences of the four principal officers, and state date of organization, or incorporation, name principal holders of stock and bonds, if any.)

   Wells Construction Company, a Company registered in B. C. of Tacoma, Washington, U. S. A. J. P. Wells, Manager and secretary, Simon Mettler, President; Geo. E. Vergowe, Vice-President.

2. Name and address of obligee: Powell River Paper Company, of Vancouver, B. C.

   (If an agent, officer or board, give full description as per contract, specifications and bond.)

3. Place and date of bid opening, if any.

   Bid.)

4. Contract) for construction of dam and canal on Powell River, B. C.

5. Bid)
   Contract) dated.
   Bid) Price approxi

6. Contract) mate $175,000.

7. Time for Completion: October 31st, 1910.
8. Penalty for delay: Not stated.
9. Grounds for extension of time:
10. Terms of payment, reserved percentage: 85% monthly—15% Reserve.
11. Does contract cover patent indemnity?
12. Terms and duration of guarantees of efficiency, maintenance and repairs, if any, in contract or specifications: None.
13. Date of bond: ———.
14. Amount of bond: $25,000. **[6]**
15. If a bid bond, will it operate as a contract bond? ———
16. If a bid bond, not to operate, as a contract bond, amount of contract bond will be $———; if not specified, then the amount in which surety on contract bond must justify will be, $———.
17. Limit on time for suit: ———.
18. Name, title and address of architect or engineer in charge: N. O. Hardy.
19. If you bid for the contract, give other bids including highest and lowest:

Name.	Address.	Bid.
	No others.	

20. State nature of business, and if carried on in other States, territories or countries, specify the same: ———. General Contractors, Vancouver, B. C., & Tacoma, Washington.
21. State number years previous experience as contractor: 10 years.
22. What other contracts have you on hand?

State contract price in each case and percentage of work completed:

Paving contract in Tacoma, $130,000, 70% completed.

Storm Sewer Contract in Tacoma, $24,612, 80% completed done in 40 days.

8 Story Building in Tacoma, $45,000, 95% completed to be completed 15 June.

Metropolitan Bldg. in Vancouver, $57,000, 5% completed.

Pacific Development Co. — excavation, 12000 25% completed.

Not taking any more work in Tacoma.

23. What arrangements have you made for supplies, materials, subcontracts, etc., in connection with the work provided for in said contract? Owner to furnish all materials—not subcontracting.

24. Do you carry life insurance? Name companies and amounts: Yes, all the principal officers carry from $5,000 to $35,000.

25. Do you carry employers' liability insurance? Name companies and amounts: Yes.

26. If you bid for the contract did you give a proposal bond? If so, state amount and names and residences of your sureties: No.

27. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result: No.

28. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? Yes. Principally by the

Title Guarantee & Surety Co. of Scranton, [7] Pa. $164,000 Bonds outstanding in Tacoma.

29. Are you engaged or interested in any other line of business? If, so, state its nature, location, firm name, names of partners, etc.: No.

30. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way become discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed: No.

31. References. (Bankers, merchants, supply houses and others with whom you have had contracts, preferred.)

Name.	Occupation.	Address.
Peter Sandberg,	Capitalist,	Tacoma, Wash.
John W. Link,	" ex-Mayor,	Tacoma, Wash.
Pacific National Bank,		" "
Stebbens, Walker Spinning,	Wholesale	" "
Tacoma Trading Company,	material men.	Tacoma, "

Should the AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, do hereby, in consideration thereof, jointly and severally undertake and agree:

I. That the statements contained in the forego-

ing application are true.

II. That the indemnitor will immediately pay the Surety at its office, 100 Broadway, New York City, $875 and $875 on the 2d day of June in each year hereafter and until the indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from such suretyship, and all liability by reason thereof, and any and all renewals and extensions of the same, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination directly or indirectly fixing or discharging such liability.

III. That in the event of said Surety executing as surety or procuring the execution by sureties of the contract bond or bonds, required to be given if said contract or contracts be awarded to the applicant, or if said bond or bonds now applied for shall operate as such contract bond or bonds, or in the event of a contract being awarded and no contract bond required, the indemnitor will pay it, said Surety —— per cent of the amount of such contract, award or orders annually in advance (no premium to be less than Ten Dollars, however); and the indemnitor does also agree that all the terms and conditions of this agreement shall cover and apply to the contract bond or bonds so executed.

IV. That the indemnitor will perform all the conditions of said [8] bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and

against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

V. That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminary to determining or fixing any liability which the Surety may be called upon to discharge by reason of such suretyship, and any and all renewals and extensions thereof, the indemnitor will immediately notify the Surety thereof in writing at its said office.

VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surey's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding

from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business.

VII. That the indemnitor will, upon the request of the Surety, procure the discharge of the Surety from said suretyship, and all liability by reason thereof, and any and all renewals and extensions thereof.

VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety its attorney for such purpose.

IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such

suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the surety. [9]

X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship.

XI. That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the principal named in the suretyship obligations, or of any persons acting on behalf of the principal or of the indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

XII. That any person making appraisals or

valuations of property, or examinations of titles to property, or otherwise advising concerning the same, shall, whether nominated by the Surety, the principal, the indemnitor, or any other person, be deemed to be the agent of the principal and of the indemnitor and not of the Surety, notwithstanding that the person so acting may be an employee or other representative of the Surety Company.

XIII. That the liability of the indemnitor hereunder shall not in any wise be limited or discharged by any alteration, renewal, extension or modification of the suretyship which shall have been requested or assented to by the principal in said obligation named and by the Surety; but, on the contrary, all the terms of this agreement shall apply to any and all such alterations, renewals, extensions and modifications.

XIV. That upon notice to, or discovery by, the Surety of the failure of the indemnitor to comply with any provision of the contract above mentioned, the Surety may immediately take possession of such plant and materials as the indemnitor may own or have upon, or adjacent to, or intended to be used upon said work, so that the Surety may use the same in the prosecution of such contract, and right to possession of such plant and materials shall not be considered as waived by any delay on the part of said Surety to exercise said right. In the event of the principal named in said bond being declared in default by the obligee therein named, the Surety shall have the right to collect and receive all reserve percentages and all moneys due and to become due such

principal under said contract, and to hold and apply the same as collateral to this agreement.

XV. That the indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the indemnitor:

—and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of $——— with authority to the Surety, on nonperformance [10] of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case said collateral is cash, to pay therefrom any sum which the indemnitor may become liable to pay the Surety by reason of any contract between the parties hereto; in case such security is the obligation of any person at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof or any substitutes therefor, or any additions thereto, without notice, at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or

broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

Signed and sealed June 2d, 1910.

(Signed) WELLS CONST. CO.
" By JOE WELLS.
" JOE WELLS. (Seal)

Signed, sealed and delivered in the presence of:
(Signed) F. B. LEWIS.

ACKNOWLEDGE SIGNATURES ON THIS PAGE.

Province British Columbia,
City of Vancouver,—ss.

On the second day of June, 1910, before me personally appeared Joe Wells to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

[Seal] (Signed) F. B. LEWIS.

Province of British Columbia,
City of Vancouver,—ss.

On the second day of June in the year 1910 before me personally came Joe Wells to me known, who being by me duly sworn, did depose and say: that he resided in Tacoma and that he is the Secretary of the Wells Construction Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of

directors of said corporation, and that he signed his name thereto by like order.

(Signed) B. F. LEWIS. (Seal) [11]

Par. VI.

But for the want of indemnitors said application was returned and thereafter, on or about and between the 15th and 20th day of June, 1910, a further application, as next hereinafter set forth, was made, signed and subscribed on the 15th day of June, 1910, at Vancouver in British Columbia, by Geo. E. Vergowe and A. H. Cederberg respectively, and on the 16th day of June, 1910, at the same place, by Joe Wells, and on the 20th day of June, at the City of Tacoma, in the State of Washington by Simon Mettler and Peter Sandberg, one of the defendants herein, and that said Peter Sandberg then and there signed and subscribed the same in order to enable the said Wells Construction Company to take and obtain, as it did in pursuance thereof take and obtain, construction contracts in which said Peter Sandberg was interested, and that said further application was in words and figures as follows, to wit:

Form C. F. Reamended. 16M 9'09.

State—Vancouver, B. C.

Agency—F. B. Lewis.

AMERICAN SURETY COMPANY
of New York.

A. No. 82
(Eighty-two)

Capital and Surplus, $5,500,000.

Bond No. 797682.

APPLICATION FOR CONTRACT OR BID BOND.

Amount—$25,000.00

NOTE—These should accompany this application:

1. Financial Statement, Form C 413 with schedules.
2. Copy of Contract, or in case of a bid, of advertisement, instructions and bid showing date and signature.

(Copy contract to follow.)

3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Company's Office Building, 100 Broadway, N. Y.

Premium $875.00

Vancouver, B. C.

Place and date of this Application. (Place) June 2d, 1910. (Date)

To American Surety Company of New York:

Application is hereby made for a bond of suretyship, as follows:

1. Name, age, business address and residence.
   (In the case of a partnership, add name and residence of each partner; in the case of a corporation add names and residences of the four principal officers, and state date or organization or incorporation, name principal holders of stock and bonds, if any.)
   Wells Construction Company, a Company registered in B. C. of Tacoma, Washington, U. S. A. Jos. Wells, Manager & Secy., Simon Mettler, President, Geo. E. Vergowe, Vice-President. [12]
2. Name and address of obligee Powell River Paper Company of Vancouver, B. C. (If an agent, officer or board, give full description as per contract, specifications and bond.)
3. Place and date of bid opening, if any: ———.
4. Contract for Construction of dam and canal on Powell River, B. C.
5. Contract dated June 2d, 1910.
6. Contract price, approximate: $175,000.
7. Time for completion October 31st, 1910.
8. Penalty for delay: Not stated.
9. Grounds for extension of time: ———.
10. Terms of payment, reserved percentage 85% monthly; 15% Reserve.
11. Does contract cover patent indemnity?
12. Terms and duration of guarantee of efficiency, maintenance and repairs, if any, in contract or specifications: None.
13. Date of bond; June 24th, 1910.
14. Amount of Bond: $25,000.

15. If a bid bond, will it operate as a contract bond?
16. If a bid bond, not to operate as a contract bond, amount of contract bond will be, $———, if not specified, then the amount in which surety on contract bond must justify will be, $———.
17. Limit on time for suit: January 31st, 1911.
18. Name, title and address of architect or engineer in charge: N. O. Hardy.
19. If you bid for the contract, give other bids including highest and lowest: No others.
20. State nature of business, and if carried on in other States, territories or countries, specify the same: ———. General Contractors, Vancouver, B. C. Tacoma, Washington.
21. State number years previous experience as contractor: 10 years.
22. What other contracts have you on hand? State contract price in each case and percentage of work completed:

    Paving Contract in Tacoma, $130,000, 70% completed.

    Storm Sewer Contract in Tacoma, 24,612 80% completed, done in 40 days.

    8 story building in Tacoma, 45,000, 95% completed to be completed 15 June.

    Metropolitan Building in Vancouver, 57,000, 5% completed.

    Pacific Development Co. excavation, 12,000, 25% completed.

    Not taking any more work in Tacoma.
23. What arrangements have you made for supplies, materials, subcontracts, etc., in connection

with the work provided for in [13] said contract? Owner to furnish all materials, not subcontracting.

24. Do you carry life insurance? Name companies and amounts: ———.

Yes, all the principal officers carry from $5,000 to $35,000.

25. Do you carry employers' liability insurance? Name companies and amounts: Yes.

26. If you bid for the contract did you give a proposal bond? If so, state amount and names and residences of your sureties: No.

27. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result: No.

28. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? Yes, principally by the Title Guarantee & Surety Co. of Scranton, Pa. $164,000 Bonds outstanding in Tacoma.

29. Are you engaged or interested in any other line of business? If so, state its nature, location, firm name, names of partners, etc: No.

30. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way become discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed: No.

31. References. (Bankers, merchants, supply houses and others with whom you have had contracts, preferred.)

Name.	Occupation.	Address.
Peter Sandberg	Capitalist.	Tacoma Wash.
John W. Link	" ex-Mayor	Tacoma
Pacific National Bank		"
Stebbins, Walker Spinning, wholesale material men		"
Tacoma Trading Co.		"

Should the AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, do hereby in consideration thereof, jointly and severally undertake and agree:

I. That the statements contained in the foregoing application are true.

II. That the indemnitor will immediately pay the Surety at its office, 100 Broadway, New York City, $875.00 on the 2d day of June in each year hereinafter and until the indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from such suretyship, and [14] all liability by reason thereof, and any and all renewals and extensions of the same, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination directly or indirectly fixing or discharging such liability.

III. That in the event of said Surety executing or procuring the execution by sureties of the contract bond or bonds, required to be given if said contract or contracts be awarded to the applicant, or if said bond or bonds now applied for shall operate as such contract bond or bonds, or in the event of a contract being awarded and no contract bond required, the indemnitor will pay it, said Surety ——— per cent of the amount of such contract, award or orders annually in advance (no premium to be less than Ten Dollars, however); and the indemnitor does also agree that all the terms and conditions of this agreement shall cover and apply to the contract bond or bonds so executed.

IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship and any and all renewals and extensions thereof, and before it shall be required to pay the same.

V. That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminary to determining or fixing any liability

which the Surety may be called upon to discharge by reason of such suretyship, and any and all renewals and extensions thereof, the indemnitor will immediately notify the Surety thereof in writing at its said office.

VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way effect the Surety's license or right to transact business.

VII. That the indemnitor will, upon the request of the Surety, procure the discharge of the Surety from said suretyship, and all liability by reason thereof, and any and all renewals and extensions thereof.

VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and any

and all extensions [15] and renewals thereof, together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose.

IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.

X. That the Surety also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and

earnings; the indemnitor being substantially and beneficially interested in the award and performace of such contract and obtaining such suretyship.

XI. That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the principal named in the suretyship obligation, or of any person acting on behalf of the principal, or of the indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

XII. That any person making appraisals or valuations of property, or examinations of title to property, or otherwise advising concerning the same, shall, whether nominated by the Surety, the principal, the indemnitor, or any other person, be deemed to be the agent of the principal and of the indemnitor and not of the Surety, notwithstanding that the person so acting may be an employee or other representative of the Surety Company.

XIII. That the liability of the indemnitor hereunder shall not in any wise be limited or discharged by any alteration, renewal, extension or modification of the suretyship which shall have been requested or assented to by the principal in said obligation named and by the Surety; but, on the contrary, all the terms of this agreement shall apply to any and all such al-

terations, renewals, extensions and modifications.

XIV. That upon notice, or discovery by, the Surety of the failure of the indemnitor to comply with any provision of the contract above mentioned, the Surety may immediately take possession of such plant and materials as the indemnitor may own or have upon, or adjacent [16] to, or intended to be used upon said work, so that the Surety may use the same in the prosecution of such contract, and right to possession of such plant and materials shall not be considered as waived by any delay on the part of said Surety to exercise said right. In the event of the principal named in said bond being declared in default by the obligee therein named, the Surety shall have the right to collect and receive all reserve percentages and all moneys due and to become due such principal under said contract, and to hold and apply the same as collateral to this agreement.

XV. That the indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the indemnitor: and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of $——— with authority to the Surety, on nonperformance of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case

said collateral is cash, to pay therefrom any sum which the indemnitor may become liable to pay the Surety by reason of any contract between the parties hereto; in case such security is the obligation of any person, at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof, or any substitutes therefore, or any additions thereto, without notice, at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

Signed and sealed June 15th, 1910.

WELLS CONSTRUCTION CO. (Seal)
(Signed) Per A. H. CEDERBERG,
Chief Engineer.
" SIMON METTLER. (Seal)
" GEO. E. VERGOWE. (Seal)
" PETER SANDBERG. (Seal)
" JOE WELLS. (Seal)

Signed, sealed and delivered in the presence of:
F. B. LEWIS,
As to Wells Construction Co.
GEO. E. VER*GOUE,*
JOE WELLS,

ACKNOWLEDGE SIGNATURES ON THIS PAGE.

Province of British Columbia,
City of Vancouver,—ss.

On the fifteenth day of June, 1910, before me personally appeared George E. Vergowe to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

[Seal] F. B. LEWIS,
Notary Public. [17]

Province of British Columbia,
City of Vancouver,—ss.

On the fifteenth day of June, in the year 1910, before me personally came A. H. Cederberg to me known, who being by me duly sworn, did depose and say: that he resided in Vancouver, B. C., that he is the Chief Engineer of the Wells Construction Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that

he signed his name thereto by like order.

[Seal] (Signed) F. B. LEWIS.

FOR MAKER OF A DEED.

797682.

I HEREBY CERTIFY that Joseph Wells personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office, at Vancouver, B. C., this sixteenth day of June, in the year of Our Lord one thousand nine hundred and ten.

[Seal] (Signed) F. B. LEWIS,

A Notary Public in and for the Province of British Columbia.

797682.

I HEREBY CERTIFY that Simon Mettler personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office, at Tacoma, this 20th day of

June, in the year of Our Lord one thousand nine hundred and ——.

[Seal] (Signed) JAMES E. BURKEY,
A Notary Public in and for the State of Washington.

797682.

I HEREBY CERTIFY that Peter Sandberg personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office at Tacoma, this twentieth day of June, in the year of Our Lord one thousand nine hundred and ten.

[Seal] (Signed) JAMES E. BURKEY,
A Notary Public in and for the State of Washington. [18]

Par. VII.

That on the 24th day of June, 1910, and in pursuance of said application and contract of indemnity of Peter Sandberg as aforesaid, the plaintiff made, executed and delivered its standard form of contract bond with Wells Construction Company as principal and itself as surety to Powell River Paper Company, Limited, of Vancouver, B. C., in the penal sum of twenty-five thousand dollars ($25,000), conditioned, among other things, that if Wells Construction Company should indemnify the Powell

River Paper Company, Limited, against any loss or damage directly arising by reason of the failure of the Wells Construction Company to faithfully perform the said contract of the 2d day of June, 1910, for the construction of the aforesaid dam and the aforesaid canal on Powell River in British Columbia, then the bond should be void, otherwise to remain in full force and effect; that thereafter, and with the consent of Wells Construction Company and with its signature to the stipulation, it was stipulated in reference to said bond that the limitation date of suit or action to be brought thereon for damages, if any occurring, should be the 30th day of April, 1911, instead of the 31st day of January, 1911, as first in said bond set forth among the other conditions of said bond not now presently material hereto.

Par. VIII.

That on the 27th day of April, 1911, and within the time prescribed in said bond and for failure to perform the contract of June 2, 1910, Powell River Paper Company, Limited, in the Supreme Court of British Columbia, issued its writ and brought a suit against Wells Construction Company and American Surety Company of New York, the plaintiff herein, claiming and demanding under said contract of June 2, 1910, sundry and various large sums of money. [19]

Par. IX.

That on the 17th day of May, 1911, there was served upon the defendant Peter Sandberg at his then residence, being No. 1128½ Pacific Avenue, in

the city of Tacoma, Washington, a notice of said suit or action so brought by Powell River Paper Company, Limited, against Wells Construction Company and this plaintiff, setting forth the writ and giving the particulars of said suit of action and notifying and requiring the said Peter Sandberg to appear and defend said suit in behalf of American Surety Company of New York, the plaintiff herein, and further notifying him, the said Peter Sandberg, that in the event he did not do so that he would be bound by the judgment rendered in said cause, but that the said Peter Sandberg did not comply with said notice or defend said suit or take any action or proceedings therein for and on behalf of this plaintiff or in defense of any part of said suit.

Par. X.

That thereafter such proceedings were had in said Supreme Court of British Columbia that on Monday, the 5th day of May, 1913, there was rendered and given, and thereafter entered on the 20th day of September, 1913, a judgment in said cause against Wells Construction Company and American Surety Company of New York for thirty-one thousand six hundred *thirty and* 94/100 dollars ($31,632.94) and the penalty of said bond forfeited against said American Surety Company of New York and the said plaintiff herein was compelled to pay the whole and every part of said judgment, but the said defendant Peter Sandberg has not indemnified the plaintiff as in his aforesaid agreement of indemnity set forth nor repaid any part of the same to this plaintiff, although the said Peter Sandberg knew

and was notified thereof and demand made upon him so to do. [20]

Par. XI.

That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and indemnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.

Par. XII.

That in and by paragraph IX in said application and indemnity agreement hereinbefore referred to and in paragraph VI hereof described, it is, among other and various things, provided that the order, judgment or adjudication by reason of such suretyship shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability thereof to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of the said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement and that the suretyship was entered into for the special benefit of the said Peter Sandberg and the special benefit and

protection of Peter Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship and to both said clauses IX and X said Peter Sandberg agreed in addition to the other clauses in said agreement. [21]

Par. XIII.

That the defendant Peter Sandberg contracted with the plaintiff in the manner aforesaid in the prosecution of the community estate, business and enterprise in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company and of contracts entered into between it and Powell River Paper Company, Limited, on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia and participation in profits derived from its operations in the Province of British Columbia and would and did further obtain the postponement of payment and discharge of indebtedness of Peter Sandberg and said community, estate and business from liability thereon to said Wells Construction Company.

Par. XIV.

That in and by said agreement of indemnity it is and was, among other and various things, also provided that all expenses, costs and charges to which said American Surety Company of New York should be put in and about the giving of said bond or the defense of any proceedings thereon should be paid and reimbursed to it by the said indemnitor, and that in

and about the maintenance of said suit and action of the said Powell River Paper Company, Limited, against said Wells Construction Company in said Supreme Court of British Columbia there was reasonably and fairly laid out and expended and incurred in and about said proceedings in said Court, in addition to the amount of said bond, the sum of fourteen hundred forty-nine and 85/100 dollars ($1449.85), which the said Peter Sandberg in the aforesaid agreement of indemnity promised and agreed to repay, but that he has not done so nor has any part thereof been repaid.

WHEREFORE, American Surety Company of New York prays judgment against Peter Sandberg and Mathilda Sandberg, his wife, to [22] the extent of her interest whatever it may be, for the sum of twenty-five thousand dollars ($25,000), with interest thereon from the 17th day of May, 1911, at six per cent. (6%) until paid, and for the further sum of fourteen hundred forty-nine and 85/100 dollars ($1449.85) with interest thereon at the rate of six per cent. (6%) from the 22d day of September(1913, until paid, being an aggregate of twenty-six thousand four hundred forty-nine and 85/100 dollars ($26,449.85) with interest on the main portions of said amounts from the respective dates above stated, together with costs and disbursements of this proceeding.

ELLIS LEWIS GARRETSON,
H. B. LAMONTE,
WM. C. BRISTOL,
Attorneys for American Surety Company of New York. [23]

Answer.

Come now defendants, and make the following answer to plaintiff's complaint herein.

I.

Answering paragraph VI, defendants admit that defendant Peter Sandberg signed and subscribed the application for a contract bond, a copy of which application is set forth in said paragraph, but these defendants deny that he signed and subscribed said application in order to enable said Wells Construction Company to take and obtain construction contracts in which said Peter Sandberg was interested.

These defendants further allege that defendant Peter Sandberg signed said application for the sole use, benefit and accommodation of the said Wells Construction Co., and not for the use, benefit or profit of himself or his codefendant Mathilda Sandberg, nor of the community consisting of said defendants, nor for the aid, use and benefit of any purpose in which said defendants, or either of them, or the community consisting of said defendants was interested in any way whatsoever.

II.

Answering paragraph VII of said complaint defendants admit plaintiff executed the bond therein referred to, but deny each and every other allegation therein contained.

III.

Defendants have no knowledge regarding the allegations contained in paragraph X of said complaint, and therefore deny each and every of said allegations,

except that defendant Peter Sandberg has made no payments whatever to plaintiff, on account of said indemnity agreement. [24]

IV.

These defendants deny each and every allegation contained in paragraph XI of said complaint.

V.

Answering paragraph XII of said complaint defendants deny that defendant Peter Sandberg was substantially, beneficially or in any other way interested in the award and performance of said contract, or in obtaining said suretyship, and deny that said suretyship was entered into by said Peter Sandberg for his special benefit, or for the benefit and protection of his property, its income or earnings.

Defendants allege, as heretofore done, that said application and indemnity agreement was signed by defendant Peter Sandberg for the sole use, benefit, profit and accommodation of said Wells Construction Company, and not for the use, benefit or profit of either of these defendants, nor of the community consisting of them.

VI.

Answering paragraph XIII these defendants deny that defendant Peter Sandberg contracted with plaintiff in the manner set forth in the previous paragraphs in the prosecution of the community estate, business and enterprise, and in such a manner that the community would, and did, obtain the benefit of the continuance of the business of the Wells Construction Company, and of contracts entered into between it, and the Powell River Paper Company

Ltd., on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia, and deny that said defendants, or either of them, or the community consisting of them, were in *any whatsoever* interested in the participation of the profits derived from the operations of said [25] Wells Construction Company in the Province of British Columbia, and deny that defendant Peter Sanberg entered into said contract with the plaintiff under any understanding or agreement, express or implied, that he would thereby and did obtain the postponement of payment and discharge of any indebtedness whatever of himself, of said community estate and business from liability thereunder to said Wells Construction Company.

Defendants further allege that the execution of said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description, past, present or future, either to himself or his codefendant, or to the community consisting of them both, but as above alleged he signed the same as surety for the sole use, benefit, profit and accommodation of said Wells Construction Company, and not for the use, benefit, or profit of himself, or his codefendant, nor of the community consisting of them both.

VII.

Answering paragraph XIV defendants allege that they have not knowledge or information regarding the allegations therein contained, and therefore deny each and every thereof, except they admit that defendant Peter Sandberg has not paid to plaintiff any

portion of the part therein stated.

SECOND.

Further answering said complaint, and by way of a showing for affirmative relief herein, these defendants allege:

I.

That defendants are, and since November 30, 1894, have been, husband and wife.

II.

That defendants are the owners of community real [26] property in the counties of Pierce and King, in the State of Washington, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8 in Block 1101, and Lots 11 and 12, in Block 1303; in the city of Tacoma, as the same are designated upon a certain map entitled "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3d, 1875.

Also the following described tract:

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course of 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street

with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638, Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West ½ of S. E. ½, less 1 38/100 acres, and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North ½ of N. E. ¼ of Section 12, Township 20, Range 7, and S. W. ¼ of N. E. ¼ and N. E. ¼ of N. W. ¼, Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East ½ of Southeast ¼, Section 10, Township 20, Range 8, King County, Washington;

All of which said property was acquired after the marriage of [27] defendants, and by their joint

efforts, and the same is the community property of defendants.

III.

That the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant Peter Sandberg as a surety, for the sole use, profit and accommodation of a third person, to wit, Wells Construction Company, as set forth in paragraph I of this answer, and was not executed for the use, benefit or profit of defendants, or either of them, nor the community consisting of defendants, and any obligation incurred thereby by the said defendant Peter Sandberg, is not a debt or obligation of the community consisting of these defendants.

Defendants further allege that if a judgment is rendered thereon against these defendants jointly, or against said defendant Peter Sandberg individually, it will be a cloud upon the title to the community real property of these defendants hereinbefore set forth.

WHEREFORE, defendants pray that said action be dismissed, and that they be allowed their costs herein.

Further, defendants pray that if any judgment be rendered herein against defendant Peter Sandberg that the same be adjudged and decreed to be a judgment against him individually, and that the same is not a debt or obligation of the community of these defendants, and that it is not, and does not constitute a lien upon the community real property of defendants, and that the real property hereinbefore set forth be adjudged to be the community property of defend-

ants free and clear of any judgment that may be entered herein.

BATES, PEER & PETERSON,
Attorneys for Defendants,
1107 Nat'l Realty Bldg.,
Tacoma, Washington. [28]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 26, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [29]

Motion of Plaintiff to Strike Out Parts of Answer.

The plaintiff, through its attorneys, moves the Court to consider of the answer herein as served on the 3d day of October, 1914, and grant an order striking out and expunging therefrom the following matter upon the following specific grounds:

I.

All of the matter in paragraph "I" of said answer commencing on line 24, page 1 of said answer, with the words "These defendants further allege," down to the end of line 2 on page 2 of said answer, in paragraph "I" thereof, ending with the words "in any way whatsoever," for the reason and upon the ground that the same is not responsive and material and is irrelevant and redundant and a legal conclusion and said matter does not present any issuable fact in connection with the paragraph of the complaint to which said matter in said answer is purported to be directed and said matter involves, if anything at all, a legal and ultimate question to be determined by this Court as matter of law, not as matter of fact.

II.

All of the matter contained in paragraph "IV" of said answer, lines 15 *to* 16, for the reason that said denial is frivolous and sham and because it is inconsistent with the admissions otherwise made in said answer.

III.

All of paragraph "V" of said answer, consisting of the matter on lines 18 to 30 on page 2 thereof, for the reason and upon the ground that the same is frivolous, and for the further reason that a party in pleading will not be permitted to deny the terms of his written contract, and for the further reason that said matter is not [30] a confession and avoidance of the contract signed by the said Peter Sandberg with the plaintiff, which the said Peter Sandberg otherwise in his said answer admits, and for the further reason that the same is a legal conclusion and involves the ultimate judgment to be passed by this Court as matter of law.

IV.

All of the matter commencing with the words "Defendants further allege," in line 22 of page 3 of said answer, paragraph "VI" thereof, down to and inclusive of the words "consisting of them both," on page 4 of said answer, for the reason that the same is a legal conclusion and not the statement of any fact, and for the further reason that a party is not permitted in pleading to deny his own contract without confessing and avoiding the same, and for the further reason that said matters present the legal questions to be adjudicated by this Court herein and do

not present issuable matters of fact tendering any issue herein.

V.

All of the matter contained in paragraph "III" of the affirmative matter contained in said answer on page 5 thereof, commencing at line 23 with the words "That the indemnity agreement," down to and inclusive of the words "hereinbefore set forth," in line 6 of page 6 of said answer, upon the ground that the same and the whole thereof is legal conclusion not matter of fact and tenders no issuable fact for trial herein but involves the ultimate determination and adjudication of this Court in said cause and is irrelevant and redundant matter.

This motion is based upon the complaint and answer filed herein and the other records, papers and files in the clerk's office in the federal courthouse at Tacoma, in this case. [31]

E. L. GARRETSON,
W. C. BRISTOL,
Attorneys for Plaintiff.

Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Oct. 9, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [32]

Order Granting Motion to Strike Parts of Answer.

This cause coming on for hearing upon the plaintiff's motion to strike out parts of defendants' answer; plaintiff being represented by its attorneys, W. C. Bristol and Ellis Lewis Garretson, defendants being represented by their attorneys, Bates, Peer &

Peterson, argument of respective counsel having been made, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED and ADJUDGED that paragraph II of said motion be, and the same is hereby granted, and paragraph IV of defendants' said answer is hereby stricken, and said answer with paragraph IV thereof thus stricken may stand as the amended answer herein.

That all of the remaining parts of said motion are hereby overruled, and denied, to which ruling plaintiff excepts, and its exception is hereby allowed.

Signed in open court this 29th day of October, A. D. 1914.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western District of Washington, Southern Division. Oct. 29, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. **[33]**

Reply to Defendants' Answer.

Plaintiff, through its attorneys, reserving all manner of objection and exception that might arise to it upon its motion against the answer of the defendants herein, for reply to said answer as the same now stands:

Par. I.

Denies that the defendants or either of them, composing the community estate of Peter Sandberg and wife, were not interested in the making of the ap-

plication referred to in said answer; and denies that defendant Peter Sandberg signed said application for the sole use or benefit or accommodation of the said Wells Construction Company; and denies that Peter Sandberg did not sign the same for the use, benefit and profit of himself and his codefendant Mathilda Sandberg; and denies that Peter Sandberg did not sign said application for the use, benefit and profit of the community consisting of said defendants; and denies that said Peter Sandberg did not sign said application for the aid or use or benefit or any purpose of said defendants or either or both of them; and denies that Peter Sandberg did not sign said application for the use, benefit or profit of the community consisting of said defendants; and denies that the community consisting of said defendants was not interested in any way whatsoever therein or in the giving of said bond or of the matters and things that grew out thereof; and denies each and every matter and thing affirmatively set forth in paragraph I of said answer.

Par. II.

Denies that said application and indemnity agreement was signed by Peter Sandberg for the sole use, benefit, profit or accommodation of said Wells Construction Company; and denies that said application and indemnity agreement were not signed by the [34] defendant Peter Sandberg for the use, benefit and profit of both the defendants and of the community consisting of them; and denies all of the affirmative matter set forth and alleged in paragraph V of said answer.

Par. III.

Denies that the execution of said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description or that it was without consideration past, present or future, either to himself or his co-defendant or to the community consisting of them both; and denies that Peter Sandberg signed said application and indemnity agreement as surety for the sole use, benefit, profit or accommodation of said Wells Construction Company; and denies that he did not sign the same for the use, benefit and profit of himself and his codefendant; and denies that he did not sign the same for the use, benefit or profit of the community consisting of them both; and denies each and every matter and thing affirmatively set forth in paragraph VI of said answer.

REPLY TO THE SECOND PART OF THE ANSWER OF DEFENDANTS AND REPLY TO THE ALLEGED SHOWING FOR AFFIRMATIVE RELIEF THEREIN.

Plaintiff, through its attorneys, reserving and not waiving the same objection and exception as hereinbefore reserved, and further replying to the second part of said answer and to the alleged showing for affirmative relief therein.

Par. I.

Admits that the defendants are and have been since the 30th day of November, 1894, husband and wife. [35]

Par. II.

Admits that the defendants are the owners of

community real property in the counties of Pierce and King in the State of Washington as set forth and described in said answer on pages 4 and 5, but as to whether or not all of said property was acquired after the 30th day of November, 1894, or by their joint efforts or that the same or all of the same is the community property of the defendants, this plaintiff has not sufficient knowledge or information with which to form a belief or knowledge sufficient to answer and therefore denies the same and calls for proof thereof; and this plaintiff denies that the property described in paragraph II of said answer is all of the community property of the defendants. Par. III.

Denies that the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant Peter Sandberg as a surety or for the sole use, profit or accommodation of a third person, to wit, Wells Construction Company; and denies that the same was not executed for the use and benefit and profit of defendants or both of them; and denies that the same was not executed for the use and profit and benefit of the community consisting of the defendants; and denies that any obligation incurred thereby and by the said defendant Peter Sandberg is not a debt or obligation of the community consisting of both the defendants; and denies that a judgment rendered against these defendants jointly or against the defendant Peter Sandberg individually would be a cloud upon the title of the community real property of the defendants in the answer set forth; and denies that the

rendition of a judgment alone in the State of Washington creates a lien or cloud or any other incumbrance upon title to real property, community or otherwise; and denies each and every matter and thing affirmatively set forth **[36]** in paragraph III of said affirmative answer.

AFFIRMATIVE REPLY CHARGING ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges: Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that defendant Peter Sandberg signed the application set forth in the complaint for the sole use, benefit and accommodation of said Wells Construction Company and not for the use, benefit or profit of himself or his codefendant Mathilda Sandberg nor of the community consisting of said defendants nor for the aid, use or benefit of any purpose in which said defendants or either of them or of the community consisting of said defendants was interested in any way whatsoever, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive

of Bird v. Steele, in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

> "X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and [37] performance of such contract and obtaining such suretyship."

—and further for that the said Peter Sandberg, at the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it upon community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they

are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

Par. II.

That plaintiff presents the aforesaid plea and the same plea to the affirmative matter set forth in paragraph V of the said answer of the defendants.

FURTHER AFFIRMATIVE REPLY CHARGING ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:

[38]

Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that the execution of the said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description, past, present or future, either to himself or to his co-defendant or to the community consisting of both of them, but as above alleged he signed the same as

surety for the sole use, benefit, profit and accommodation of said Wells Construction Company and not for the use, benefit or profit of himself or his co-defendant or of the community consisting of both of them, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive of Bird v. Steele, in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

> "X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

—and further for that the said Peter Sandberg, at

the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it [39] upon community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

Par. II.

That plaintiff presents the aforesaid plea and the same plea to the affirmative matter set forth in paragraph V of the said answer of the defendants.

FURTHER AFFIRMATIVE REPLY CHARGING ESTOPPEL.

Plaintiff, through its attorney, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:

Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant [40] Peter Sandberg as a surety, for the sole use, profit and accommodation of a third person, to wit, Wells Construction Company, as set forth in paragraph I of the answer, and was not executed for the use, benefit or profit of defendants, or either of them, nor the community consisting of defendants, or any obligation incurred thereby by the said defendant Peter Sandberg, is not a debt or obligation of the community consisting of these defendants, or that if a judgment is rendered thereon against these defendants jointly, or against said defendant Peter Sandberg individually, it will be a cloud upon the title to the community real property of these defendants hereinbefore set forth, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive of Bird v. Steele in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the

income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

—and further for that the said Peter Sandberg, at the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it upon **[41]** community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of

indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

FURTHER AFFIRMATIVE REPLY CHARGING ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:

Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say any of the matters or things attempted now to be set forth by these defendants affirmatively in their said answer, that is to say, either, first, want of consideration, or second, suretyship only, or third, accommodation for Wells Construction Company only, or fourth, that the community interest is not bound or intended so to be, or fifth, that the acts of the said Sandberg in the particulars charged in the complaint were not for the use and benefit and in the interest of the community, for that on the [42] 27th day of May, 1911, the said Peter Sandberg was personally served at his residence and at the residence of Mathilda Sandberg, his codefendant, at No. 1128½ Pacific Avenue, in Tacoma, in Pierce County, in the State of Washington, with a copy of a notice addressed to Wells Construction Company, Simon

Mettler, George E. Vergowe, Peter Sandberg and Joe Wells, in words and figures as follows, to wit:

"To the Wells Construction Company, Simon Mettler, George E. Ver*gone,* Peter Sandberg and Joe Wells:

You, and each of you, are hereby notified that on June 2, 1910, you signed an application addressed to the American Surety Company of New York to execute a bond in the penal sum of Twenty-five Thousand Dollars, in favor of the Powell River Paper Company of Vancouver, British Columbia, to secure the performance on the part of the Wells Construction Company of a dam and canal on Powell River, British Columbia, and agreed in writing to indemnify said American Surety Company of New York for any loss thereunder.

You are further notified that on or about the 27th day of April, 1911, the Powell River Paper Company, Limited, the obligee in said bond, commenced an action by summons and writ in the Supreme Court of British Columbia, a copy of which said writ is as follows:

'1911.

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

P 514 11W. M. CANCELLED LAW.

POWELL RIVER PAPER COMPANY, LIMITED,

Plaintiff,

and

STAMP 50 cts.

WELLS CONSTRUCTION COMPANY and AMERICAN SURETY COMPANY OF NEW YORK,

Defendants.

GEORGE V., by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions Beyond the Seas, King, Defender of the Faith, Emperor of India,

To

WELLS CONSTRUCTION COMPANY, a body corporate having its head office in the Province of British Columbia at the City of Vancouver and to

AMERICAN SURETY COMPANY OF NEW YORK registered in the said [43] Province of British Columbia at said City of Vancouver.

WE COMMAND YOU, that within eight days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of

POWELL RIVER PAPER COMPANY, LIMITED

(S. C. Seal)

AND TAKE NOTICE, that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

Seal of the Supreme Court of B. C.

WITNESS, The Honourable GORDON HUNTER, Chief Justice, the 27th day of April, in the year of our Lord one thousand nine hundred and eleven.

N. B.—That Writ is to be served within twelve calendar months from the date hereof, or, if renewed, within twelve calendar months from the date of such last renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an appearance, either personally or by solicitor, at the office of the District Registrar of this Honourable Court at Vancouver, British Columbia.

Vancouver Apr. 27, 1911. Registry,

The Plaintiff's claim is against the defendant the Wells Construction Company for damages for breaches of an agreement dated the 2d day of June, 1910, and made between the plaintiff of the first part and the defendant the Wells Construction Company of the Second Part and against the defendant American Surety Company of New York under a bond dated the 24th day of June, 1910, duly executed by American Surety Company of New York conditioned

for the faithful performance by the Wells Construction Company of the said agreement of the second day of June, 1910, and which bond was extended by a bond dated the —— day of July, 1910, duly executed by American Surety Company of New York for indemnity in respect of said damages as in the said bond dated the 24th day of June is mentioned.

Endorsements:

1911.

In the Supreme Court of British Columbia.

Powell River Paper Company Ltd.

vs.

Wells Construction Co. and American Surety Company of New York.

General Form

Writ of Summons.

This Writ was issued by David Stevenson, Wallbridge of [44] the firm of Bowser, Reid & Wallbridge whose address for service is 505 Hastings St. West, Vancouver, B. C. Solicitor for the said Plaintiff whose registered office is Winch Building, Hastings Street, Vancouver, B. C.'

And you are hereby notified and required to appear and defend said suit in behalf of the American Surety Company of New York; and you are further notified that in the event you do not, you will be

bound by the judgment rendered in said cause.

(Signed) AMERICAN SURETY COMPANY OF NEW YORK,
By LIVINGSTON B. STEDMAN,
Its Resident Vice-President.

(Signed) HASTINGS & STEDMAN,
Attorneys for American Surety Company of New York.

I accept service hereof on behalf of the Deft. The American Surety Company of New York and undertake to appear in due course.

Dated 27 April, 1911.

D. G. MARSHALL,
Deft. Solr.

D. S. WALLBRIDGE,
Plaintiff's Solicitor."

Par. II.

And thereby the said Peter Sandberg was fully informed of the claim against this plaintiff and of the said action that was pending and had full opportunity to defend the judgment.

Par. III.

That the said Peter Sandberg did not defend nor pay or give any attention to the said notice so served upon him and the said codefendant Mathilda Sandberg, although aware of said proceedings, did nothing likewise.

Par. IV.

That they, the said defendants, are precluded and estopped by the proceedings had and taken in the Courts of British Columbia from now setting up or being heard or allowed to allege or say any of said

matters or things, for that according to the law interpreted and adjudicated by the Circuit Court of Appeals of the Ninth Circuit in the case of Burley v. Compagnie de Navigation Francise [45] set forth and at large in 194 Federal at page 335, no such defense is permissible in this Court, for that all of the same could have been made in the courts of British Columbia in defense of the matters then litigated and the same are now *res adjudicata* as to both of said defendants.

WHEREFORE, this plaintiff prays that it may have judgment as prayed in its complaint and that the defendants have nothing by their said answer and that plaintiff have its costs and disbursements herein as originally prayed and that may be hereinafter sustained and expended.

W. C. BRISTOL,
ELLIS LEWIS GARRETSON,
Attorneys for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 7, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [46]

Separate Answer of Defendant Mathilda Sandberg.

Comes now defendant Mathilda Sandberg, and answering plaintiff's complaint, admits, denies and alleges:

I.

Answering paragraph VI thereof, defendant admits that defendant Peter Sandberg signed and sub-

scribed the application for a contract bond, a copy of which application is set forth in said paragraph, but defendant denies that said Peter Sandberg signed and subscribed said application in order to enable said Wells Construction Company to take and obtain construction contracts in which said Peter Sandberg, or this answering defendant, or either of them, was interested.

And further answering said paragraph defendant alleges that defendant Peter Sandberg signed said application for the sole use, benefit and accommodation of the said Wells Construction Company, a corporation, and not for the use, benefit or profit of himself, or this answering defendant, or either of them, nor of the community consisting of said defendants, nor for the use and benefit of, or for any purpose in which said defendants, or either of them, or the community consisting of said defendants was interested in any manner whatsoever.

II.

Answering paragraph VII of said complaint defendant admits that plaintiff executed the bond therein referred to, but denies each and every other allegation in said paragraph contained. [47]

III.

Defendant denies knowledge or information sufficient to form a belief as to the allegations made and contained in paragraph X of said complaint, and therefore denies the same, except that defendant admits that Peter Sandberg has made no payments whatever to plaintiff on account of said indemnity agreement.

IV.

~~Defendant denies each and every allegation made and contained in paragraph XI of said complaint.~~

V.

Answering paragraph XII of said complaint, defendant denies that defendant Peter Sandberg was substantially, beneficially or in any other manner or way interested in the award and performance of said contract, or of any contract, or in obtaining said suretyship, or any suretyship in which said Wells Construction Company, or any person connected with it was concerned, and denies that said suretyship was entered into by said Peter Sandberg for his special benefit, or for the benefit and protection of his property, its income or earnings, or for the benefit of the income, earnings or property of the community consisting of this answering defendant and said Peter Sandberg.

And further answering said paragraph, defendant alleges that said application and indemnity agreement was signed by defendant Peter Sandberg for the sole use, benefit, profit and accommodation of said Wells Construction Company and third parties, and not for the use, benefit or profit of this answering defendant, or of her codefendant Peter Sandberg, nor of the community consisting of this defendant and her codefendant Peter Sandberg.

VI.

Answering paragraph XIII defendant denies that defendant Peter Sandberg contracted with plaintiff in the manner set [48] forth in the preceding paragraphs of plaintiff's complaint, in the

prosecution of the community estate, business and enterprises, and in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company, and of contracts entered into between it and the Powell River Paper Company, Ltd., on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia, or at all, and denies that defendants, or either of them, or the community consisting of defendants, was in any way interested in, or participated in, or entitled to participate in the profits derived from the operations of said Wells Construction Company in the Province of British Columbia or at any other place, and denies that defendant Peter Sandberg entered into said contract with the plaintiff on any understanding or agreement that he, or defendant, or the community consisting of this answering defendant and said Peter Sandberg would thereby, and did obtain the postponement of payment and discharge of any indebtedness whatsoever of either of said defendants, or of said community, estate and business to said Wells Construction Company.

Further answering said paragraph defendant alleges that the execution of said indemnity agreement by defendant Peter Sandberg was without consideration either to himself or this answering defendant, or to the community consisting of defendants, or for the use, benefit or profit of defendants, or either of them, but was for the sole use, benefit, profit and accommodation of third parties.

VII.

Answering paragraph XIV defendant denies knowledge or information sufficient to form a belief regarding the matters and things therein set forth, and therefore denies the same, except defendant admits that defendant Peter Sandberg has not [49] paid to plaintiff any portion of the amounts therein referred to.

SECOND.

Further answering said complaint, and by way of an affirmative defense and demand for affirmative relief herein, defendant alleges:

I.

That defendant and her codefendant Peter Sandberg are, and since November 30th, 1894, have been, husband and wife.

II.

That defendants are the owners of real property in the Counties of Pierce and King, in the State of Washington, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Also the following described tract:

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along

the North line of lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington; [50]

West ½ of S. E. ¼ less 1 38/100 acres, and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ Section 8, Township 8. Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7 King County, Washington;

North ½ of N. E. ¼ of Section 12, Township 20,

Range 7, and S. W. ¼ of N. E. ¼ and N. E. ¼ of N. W. ¼ Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington.

East ½ of Southeast ¼, Section 10, Township 20, Range 8, King County, Washington.

All of which said property was acquired after the marriage of defendants by their joint efforts and not by gift, bequest or inheritance.

WHEREFORE, defendant prays that said action may in so far as this answering defendant is concerned, be dismissed, and that she have a judgment for her costs herein.

Defendant further prays that if any judgment be rendered herein against her codefendant Peter Sandberg that the same be adjudged and decreed to be his separate debt, and that it be adjudged and decreed that the same is not a debt or obligation of the community consisting of this defendant and her codefendant Peter Sandberg, and that the same is not, and does not constitute a lien upon the community real property of defendants, and that the real property hereinabove described be adjudged to be the community property of defendants.

BATES, PEER & PETERSON,
Attorneys for Defendant, Mathilda Sandberg,
Office and Postoffice Address:
1107 Natl. Realty Bldg.,
Tacoma, Washington. [51]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 4, 1915.

Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [52]

Stipulation to Try Cause to Court.

It is hereby stipulated that this cause shall be tried by the Court and before the Court without a jury.

W. C. BRISTOL and
ELLIS L. GARRETSON,
Attys. for Plaintiff.
BATES, PEER & PETERSON,
Attys. for Defendant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 4, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [53]

Opinion.

W. C. BRISTOL, ELLIS LEWIS GARRETSON, for Plaintiff.

BATES, PEER & PETERSON, for Defendants.

DECISION ON THE MERITS.

CUSHMAN, District Judge.

Plaintiff sues to recover against the defendants on account of an agreement entered into by the defendant Peter Sandberg to indemnify the plaintiff in giving a bond for the performance by the Wells Construction Company of a certain contract for the construction of a dam and canal in British Columbia, for the Powell River Paper Company.

Plaintiff alleges the bringing of a suit in British

Columbia against it upon the bond; that it called upon the defendant Peter Sandberg to defend that action and that a judgment was obtained in such action against plaintiff in the sum of $13,632.94. It alleges that, by paragraph 10 of the indemnity agreement, set out below, the defendant Peter Sandberg contracted with the plaintiff in the prosecution of the business of the community consisting of the two defendants and that the community thereby obtained the benefit of the continuance of the business of the Wells Construction Company and obtained the postponement of payment and discharge of indebtedness of Peter Sandberg and the community, estate and business from liability thereon to said Wells Construction Company.

Plaintiff asks judgment against Peter Sandberg and Mathilda Sandberg, his wife, to the extent of her interest [54] whatever it may be, for $25,000 and interest, and the additional sum of $1,449.85 and interest, the latter item on account of plaintiff's expenses in defending the suit against it in British Columbia.

Defendants, by separate answers, deny that either of them or the community formed by them was interested in the Wells Construction Company's contract with the Powell River Paper Company and aver that Peter Sandberg signed the application for the sole use, benefit and accommodation of the Wells Construction Company, without consideration to the defendants of the community and not in the prosecution of any business of the community. They deny that Peter Sandberg signed the application

with any understanding for the postponement of payment or discharge of any debt to the Wells Construction Company. Defendants interposed general denials to other portions of the complaint and set out the date of their marriage, a description of the community property and pray for a dismissal of the action and, in the alternative, that, if judgment be rendered against Peter Sandberg, that it be against him individually and that it be adjudged that the debt is not an obligation of the community; that it be adjudged that the defendants' property described in the answer is community property not subject to the lien of any judgment rendered.

Plaintiff, in its reply, denies that the defendant Peter Sandberg signed the application for the accommodation of the Wells Construction Company and avers that he did so for the benefit and profit of both defendants and the community. Plaintiff sets up the recitals of paragraph 10 of the application as representations of the defendant Peter Sandberg that he had an interest in the Wells Construction Company's contract and of the benefit to the defendants of plaintiff's suretyship, by way of estoppel, and [55] alleges that, at the time Peter Sandberg signed the application, the defendants were indebted to the Wells Construction Company to the amount sued for herein. Plaintiff further alleges the giving of notice to Peter Sandberg of the bringing of suit against it in British Columbia in which notice he was called upon to defend that action, and alleges that the judgment obtained in that action is *res adjudicata.*

In June, 1910, the Wells Construction Company applied to plaintiff for a surety bond in the amount of $25,000. The application was denied for want of indemnitors. Thereafter, on the 20th of June, the same year, another application was made, signed by the Wells Construction Company and, among other indemnitors, the defendant Peter Sandberg. This application contained the following provisions:

> "IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.
> * * *
>
> "VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of

funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business. * * * [56]

"IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be prima facie evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special

benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

This application was upon a printed form, evidently prepared by the plaintiff. Upon this application, plaintiff executed its bond in the sum of $25,000 to the Powell River Paper Company, conditioned for the indemnifying of that company against any failure on the part of the Wells Construction Company to perform its contract.

The evidence introduced shows that the defendants were married in 1894; that all of the real property described in their answers is community property. In view of the terms of paragraph VI of the application above set out, it is not necessary for the plaintiff to prove that it has paid or satisfied the judgment obtained against it in order to prevail.

Plaintiff and defendants have stipulated as to plaintiff's items of expense incurred in defending the suit in British Columbia in the amount of $1,556.20. The effect of this stipulation is to amend the complaint to that extent.

A certified copy of the judgment obtained against it in British Columbia was offered by the plaintiff upon the trial. It [57] was objected to as not properly certified or authenticated. The copy purports to be certified as a true copy by A. B. Pottenger, District Registrar. There is impressed upon

the copy what purports to be the seal of the Supreme Court of British Columbia. A certificate is attached of David L. Wilbur, Consul General of the United States of America in Vancouver, B. C., to the effect that A. B. Pottenger is a duly appointed and commissioned registrar of the Province of British Columbia.

The objection made is that there is no certificate by the Consul General, or otherwise, that the signature to the copy is that of A. B. Pottenger. Further, that there is no certificate that A. B. Pottenger is the legal custodian of such records and that there is no certificate that the purported seal is the seal of said court.

Section 905, R. S., applies only to the authentication of records of judicial proceedings had in the states and territories. It is conceded that there is no statute providing for the authentication of judicial proceedings in foreign countries. No treaty touching the question has been called to the Court's attention. Justice Gray in Hilton v. Guyot, (159 U. S. 113, at 228), intimates that there is neither statute law nor treaty on the subject of foreign judgments.

The defendants in their answers deny upon information and belief the allegations of the complaint as to the rendition of the judgment by the Supreme Court of British Columbia against the plaintiff. Plaintiff now contends that, the judgment being a matter of public record, the denial is insufficient. Plaintiff did not move against this denial in the answer, but raises the question upon the argument

after the introduction of all the evidence.

The authorities are not uniform upon the question of [58] whether it is incumbent upon the plaintiff to move to strike out such denial as sham in order to take advantage of such situation. The weight of authority appears to be that he must do so.

1 Encyc. Pl. & Pr. 812, Note;

31 Cyc. 200, 201, Note 8.

In the Case of Wallace v. Bacon (86 Fed. 553), before Judge Ross, the matter came up on motion to strike the denials from the answer. Objections of a not dissimilar nature have been held waived by not moving against them as a step preliminary to trial.

Shepherd v. Baltimore etc. R. R. Co., 130 U. S. 426 at 433;

Keator Lbr. Co. v. Thompson, 144 U. S. 434;

Town of Denver v. Spokane Falls, 7 Wash, 226 at 229;

Howard v. Hibbs, 22 Wash. 513, at 516.

In Peacock vs. United States (125 Fed. 583), the motion to strike out a denial where there was presumptive knowledge on the part of the defendant, was held to be the appropriate remedy.

Where a motion to strike lies, a failure to interpose it, is held to be a waiver.

31 Cyc. 718–2.

In order to deprive the defendants of the right, under the code, to interpose such denial, the matter so denied must be presumptively within his knowledge.

1 Encyc. Pl. & Pr. 811;

31 Cyc. 200.

The defendant has been held to have such presumptive knowledge and not allowed to so deny allegations as to his personal acts, or those of his agent, or concerning public records to which he has access, or allegations that a judgment had been rendered against him. [59]

1 Encyc. Pl & Pr. 813 & 814.

No case has been called to the Court's attention where it has been held that the defendant is presumed to know matters of record in foreign countries and no persuasive reason has been advanced for so holding. The public record, the existence of which he may not deny upon information and belief, is a public record to which he has access, as the rule is stated in the Encyclopedia of Pleading and Practive above cited. A more exact statement of the rule is found in 31 Cyc. 200:

> "Nor can facts which are readily accessible by reason of being public records, or otherwise, be put in issue by such form of denial."

Having access in the sense in which these words are used includes, not only the legal right of access, but a reasonable opportunity to avail oneself of that right.

In the complaint it is alleged that both of the defendants are, and were at all times in question, citizens and residents of the State of Washington. It may be presumed that the defendants would have the right in British Columbia to examine the records of the Supreme Court, that is, it may be presumed that they are public records of that Province, but it is not reasonable to require a citizen of this

country to journey to foreign lands to inform himself concerning the contents of public records there in order to qualify himself to answer a suit brought against him in this country.

Having had notice of the pendency of the proceedings and been called upon to defend, defendant Peter Sandberg is now estopped to deny the conclusiveness of any judgment rendered.

Robbins v. Chicago, 4 Wall. 657; 18 Law Ed. 430; [60]

Wash. Gas Light Co. v. District of Columbia, 161 U. S. 316; 40 Law Ed. 712 at 719;

Compagnie v. Burley, 183 Fed. at 168; aff'r'd 194 Fed. 335.

But, not having been a party to the action in British Columbia, nor shown to have had anything to do with its conduct, he has a right to insist on strict proof of the judgment, unless, in common with all citizens of this commonwealth, he is presumed to know the contents of the records of the courts of British Columbia.

Residents of this country are presumed to have knowledge of its laws and may be presumed to have knowledge of its records, but such does not apply to either the laws or the records of foreign countries.

In Wallace v. Bacon (86 Fed. 553), Judge Ross held a defendant in the Southern District of California to have presumtive knowledge of the levying of an assessment by the Comptroller of the Currency against a National Bank of the State of Missouri.

It may be said that the records of the Supreme Court of the Province of British Columbiba are not

so distant as the records of which the defendant in that case was presumed to have knowledge, but, unless the fact of their being records of a foreign country is made the test, a party might be held to have presumptive knowledge of the records in Thibet or Patagonia. A party cannot in reason be required to acquaint himself with all the records of the countries of the globe. To draw the line at the boundaires of his own country seems more reasonable than to extend it to the confines of Christendom, or to the countries having the civil or common law, or all.

In Oregon Ry. Co. v. Oregon Ry. & Nav. Co. (22 Fed. 245), Judge Deady writing the opinion, it is said: [61]

> "Now, upon the facts stated in this case, there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britain, by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding, and there is no evidence that it or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose. Neither is a party under any obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it, positively, unless it be to recall and verify that knowledge or information of the matter which he once had

> and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstances. And if such a denial is improperly made, it may be stricken out as sham—manifestly false, in fact. But it is not for that reason either "frivolous" or immaterial." That depends wholly on the character of the allegation denied. If that is material, the denial of all knowledge or information concerning it is also material" (at pp. 247 and 248).

This case was reconsidered in 23 Federal, 232. While nothing is said in the latter opinion to indicate a change in the rule as announced in the former case, the defendant was not allowed to question plaintiff's corporate existence, the effect of the ruling being that, having contracted with the plaintiff as a corporation, defendant would be estopped to deny its corporate existence.

> Cowie v. Ahrenstedt, 1 Wash. 416 at 418 & 419;
> Vassault v. Austin, 32 Cal. 597.

The latter case is cited with approval in 1 Washington, at 419.

Having reached the conclusion that defendants' denials were sufficient, it is not necessary to determine whether the plaintiff waived its right to object to the form of denial by not interposing a preliminary motion to strike from the answer.

No case has been cited holding a record of a foreign judgment certified as in this case, admissible in evidence. The only case found that appears to sustain its admissibility is an early case [62] in

Vermont. (Woodbridge v. Austin, 2 Tyler, 364, 4 Am. Dec. 740.) It was held in this case that the exemplifications of the record of a foreign judicial proceeding would be considered *prima facie* as correct. The great weight of authority, however, is to the contrary. (23 Cyc. 1611 and 1612, note 54.)

> "In order that a foreign judgment should be admissible in evidence, it is necessary that the exemplification of it which is produced should be duly authenticated. And this authentication should consist of the seal of the court, if it has one, the certificate of the officer in whose custody the record remains, the attestation of the principal judge of the court to the official character of the person certifying, and the whole fortified by the certificate of the executive department of the state or country and the impress of its great seal." (Black on Judgments, Vol. II, p. 849.)
>
> Cruz v. O'Boyle, 197 Fed. 824.

No reason is shown for any exception in the present case to the rule embodied in the foregoing.

The defendant Mathilda Sandberg had no knowledge that Peter Sandberg had signed the application to plaintiff for its execution of the surety bond. All of the evidence is to the effect that neither of the defendants had any financial interest in the Wells Construction Company; that Peter Sandberg signed the application at the request of Simon Mettler, an old friend of his. Joseph Wells, the Secretary of the Wells Construction Company also asked him to sign, but he received nothing for so doing. There

was no understanding that he should receive anything.

The only matter between the defendants and the Wells Construction Company at the time of signing this application was that the Wells Construction Company was then constructing a building for defendants. This building was substantially completed and paid for at the time of the signing of this application. It was paid for entirely in cash by Peter Sandberg and there was [63] no consideration of value passed to either of the defendants on account of the signing of the application, nor was anything contemplated. The Wells Construction Company was then in good financial standing.

Under these circumstances, it is clear that the mere fact that the defendant Peter Sandberg had, at the time of signing the application, other contractual relations with the Wells Construction Company would not make him other than an accommodation indemnitor and, of itself, would not make a debt growing out of the indemnity agreement the debt of his wife or the community.

The fact that Peter Sandberg paid, direct, certain materialmen furnishing supplies for the construcion of the Kentucky Liquor Company building under a contract with the Wells Construction Company is not unusual conduct under such circumstances. His becoming an indemnitor for the Wells Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that, thereby, he would protect any community interest in the completion of

the Kentucky Liquor Company building.

The community property statute of the State of Washington provides:

> "Property not acquired or owned, as prescribed in sections 2400 and 2408 (by gift, devise or inheritance) acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with *alike* power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

Debts incurred by the husband in the prosecution of any business which, if successful, will result in profit to the community are community debts.

McDonough v. Craig, 10 Wash., 239, at 241. **[64]**

If all debts incurred by the husband are *prima facie* community debts, as indicated in the foregoing decision, that *prima facie* presumption is conclusively overcome by the evidence in the present case showing that no profit or benefit could result to the community from the act of Peter Sandberg in signing the application or from the transaction or business with which it was connected.

In Milne v. Kane (64 Wash. 254) and Woste v. Rugge (68 Wash. 90), where the community was held liable for the tort of the husband, it was only so held upon the finding that the tort committed by him while engaged in a business conducted for the benefit of the community.

In McGregor v. Johnson (58 Wash. 78), where the

community was held liable for the successful fraud practiced by the husband, it was only so held upon a finding that the wrongful profit from the fraud inured to the benefit of the community.

The community is liable where the husband signs an obligation as surety, or accommodation maker for a corporation in which he is a stockholder or director, but if not interested in such corporation at or prior to the time of incurring such obligation, the community is not liable.

Horton v. Donohoe Kelly Bank Co., 15 Wash. 399;

Shuey v. Holmes, 20 Wash. 13;

Shuey v. Holmes, 22 Wash. 193.

The community will be estopped to deny the husband's debt incurred for the benefit of the community and with the wife's knowledge.

McGregor v. Johnson, 58 Wash. 78. [65]

But it will not be estopped where the husband incurs the debt without the wife's knowledge and it is not in the prosecution of community business and cannot, in the ordinary course, result in any benefit to the community.

Brotton v. Langert, 1 Wash. 73;

Gund v. Parke, 15 Wash. 393;

Bird v. Steele, 74 Wash. 68 at 70;

Spinning v. Allen, 10 Wash. 570.

Another one of the indemnitors, a stockholder in the Wells Construction Company, promised to indemnify Peter Sandberg for signing the application in question. Later Peter Sandberg brought a suit to enforce this provision for indemnity. He also,

about the time he signed the application in question, became security on certain notes of the Wells Construction Company. Later, after that company got into financial difficulties, its stock was delivered to the attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save himself. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or [66] gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs.

Plaintiff is entitled to judgment against Peter Sandberg for its expenses, fixed by the stipulation at $1,556.20 and interest thereon.

This case having been tried to the court without a jury, at the time the exemplification of the record of judgment was offered in evidence by the plaintiff and objection made, the record was admitted tenta-

tively, a final ruling being reserved. Having reached the conclusion that the objection should have been sustained, it is clear that failing to rule finally at the time of the offer, the plaintiff may have been prejudiced in that, if such ruling had then been made, plaintiff could have asked for a continuance in order to supply a legal authentication of the copy. The making of findings and final judgment herein will be delayed ten days to afford the plaintiff an opportunity to move to reopen the case for such purpose.

It is not necessary to determine whether the recital of interest in paragraph 10 of the application estops Peter Sandberg, as he is bound in any event. No right of recovery has been established against Mathilda Sandberg or the community. The debt established is that of Peter Sandberg and the community real estate is not subject to any lien on account of the judgment herein.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 31, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [67]

Requests by the Plaintiff for Findings of Fact and Conclusions of Law.

Comes now the plaintiff American Surety Company of New York, by its attorney, and pursuant to the civil procedure prescribed in the courts of the United States by the Acts of Congress, requests the Court, upon the pleadings and upon the evidence, documentary and oral, introduced in this cause to

find the facts and conclusions therefrom as follows:

Findings of Fact.

FIRST FINDING:

That on the 20th day of June, 1910, Peter Sandberg, in the regular ordinary course of business, subscribed, sealed and acknowledged the application and indemnity agreement bearing date on that day and designated herein "Plaintiff's Exhibit 2."

SECOND FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

> "IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same."

THIRD FINDING:

That said application and indemnity agreement so signed by [68] Peter Sandberg contained, among other provisions, the following:

"VII. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business."

FOURTH FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication, by reason of such suretyship, shall be *prima facie*

evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety."

FIFTH FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special [69] benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

SIXTH FINDING:

Peter Sandberg and Mathilda Sandberg, the defendants, were married in November, 1894, and from that time down to the present had, used, owned, or possessed no other property than community property.

SEVENTH FINDING:

That at the time Peter Sandberg signed Plaintiff's Exhibit 2, June 20, 1910, there was no other property in the possession or under the control of said Peter

Sandberg or which he then or thereafter had than the community property and estate of himself and his wife, the defendant Mathilda Sendberg, and the rents, earnings, issues and income derivable therefrom.

EIGHTH FINDING:

That on the 24th day of June, 1910, in pursuance of the application and contract of indemnity mentioned in the foregoing finding, plaintiff made, executed and delivered its standard form of contract bond with Wells Construction Company as principal and itself as surety to Powell River Paper Company, Ltd., of Vancouver, B. C., in the penal sum of twenty-five thousand dollars ($25,000.00), and the same was received in evidence in this case and marked "Plaintiff's Exhibit 3."

NINTH FINDING:

That on the 27th day of April, 1911, Powell River Paper Company, [70] Ltd., in the Supreme Court of British Columbia, issued its writ and brought a suit against Wells Construction Company and American Surety Company of New York.

TENTH FINDING:

That on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his residence in Tacoma, Washington, and at the residence of Mathilda Sandberg in Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., giving the particulars thereof and notifying and requiring Peter Sandberg to appear and defend said suit; that neither of the defendants appeared or defended said suit.

ELEVENTH FINDING:

That thereafter such proceedings were had in said Supreme Court of British Columbia that on Monday, the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells Construction Company for thirty-one thousand six hundred thirty-two and 94/100 dollars ($31,632.94) and against American Surety Company of New York for the amount of its said bond in the sum of twenty-five thousand dollars ($25,000.00) and the penalty of said bond in words and figures as follows, to wit:

> "And this Court doth further order and adjudge that the plaintiff do recover against the defendant Wells Construction Company the sum of $31,632.94 for such expenditures aforesaid and against the defendant American Surety Company of New York, as surety, the sum of $25,000.00 upon their said obligation."

TWELFTH FINDING:

That on June 20, 1910, when the contract of indemnity, "Plaintiff's Exhibit 2," was signed by Peter Sandberg, the Wells [71] Construction Company was then constructing a building for Peter Sandberg and Mathilda Sandberg, his wife, under and pursuant to the terms of a contract designated herein Defendants' Exhibit "A," and that at said time, June 20, 1910, said building was not completed.

THIRTEENTH FINDING:

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants

from any liability under Plaintiff's Exhibit 2, and said agreement was introduced and received in evidence herein as "Plaintiff's Exhibit 10."

FOURTEENTH FINDING:

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars ($35,000.00) then due.

FIFTEENTH FINDING:

That on November 26, 1910, Kentucky Liquor Company, with Wells Construction Company, Simon Mettler and George Vergowe made and entered into an agreement in writing as introduced in evidence herein in words and figures as follows, to wit:

This agreement, Made and entered into this 26th day of November, A. D. 1910, between the KENTUCKY LIQUOR COMPANY, a Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, George Vergowe and Carrie Vergowe, his wife, parties of the first part, and SIMON METTLER, party of the second part, WITNESSETH; Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg, and the Bank of Vancouver, a British Columbia corporation, The Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit: [72]

Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range

Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26), Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North ½ of NE. ¼ of SW. ¼, of NW. ¼ Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg, and the Bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

The North Thirty (30) acres of the Northwest Quarter (¼) of the Northwest Quarter (*3/4*) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest Quarter (¼) of the Southwest Quarter (¼) of the Northwest Quarter (¼) of the same section, township and range,

—which said conveyance by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

A note for Fifty-five Thousand ($55,000) Dollars, made by the Wells Construction Company to the said

Molsons Bank, a corporation dated at Vancouver, B. C., ———, 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said The Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand ($25,000) Dollars; one to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand ($27,000) Dollars; one to the City of Vancouver in the principal sum of Ten Thousand ($10,000) Dollars; one to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand ($3,000);

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to [73] Seventy-nine Thousand, Five Hundred Dollars ($79,500), besides interest;

And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., *a* numerous other persons,

which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent;

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligation on which said Peter Sanderg is endorser, or has become liable in any manner whatever, and thereafter said Kentucky Liquor Company, trustee, shall apply by conversion, or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, for fur-

ther paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank, a corporation, and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, the Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked [74] and recorded, authorized their President and Secretary, respectively, to execute these presents and attached the corporate seals of said corporations, respectively, hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

KENTUCKY LIQUOR COMPANY, a Corporation.

By (PETER SANDBERG,)
Its President.

Attest (P. H. LUCK,)
Secretary.

WELLS CONSTRUCTION COMPANY, a Corporation.

By (CHARLES T. PETERSON,)
Its President.

Attest (NEWTON H. PEER,)
Secretary.

(GEORGE E. VERGOWE.)

(SIMON METTLER.)"

That Elmer M. Hayden thereafter became successor trustee to Kentucky Liquor Company, under

said agreement in this finding set out.

SIXTEENTH FINDING:

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

SEVENTEENTH FINDING:

That prior thereto and on the 19th day of October, 1910, agreements in writing providing for joint and several liability upon the part of Sandberg, Mettler, Vergowe and Wells were entered [75] into with Molsons Bank and the Bank of Vancouver in British Columbia, covering financial transactions and operations of the Wells Construction Company.

EIGHTEENTH FINDING:

That during all the times herein mentioned Messrs. Bates, Peer & Petersen were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Molsons Bank in the Mettler bankruptcy proceedings and for Kentucky Liquor Company and Messrs. Peterson and Peer were on November 26, 1910, President and Secretary respectively of Wells Construction Company.

NINETEENTH FINDING:

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler were defendants and

the same is in evidence in this cause as "Plaintiff's Exhibit 7," and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:

> "III. That on or about said last date above referred to, to wit, the —— day of August, A. D., 1910, the defendants Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation, in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells [76] Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsement of said notes, bonds, guarantees, and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business." * * *

"IV. That pursuant to said agreement so entered into, plaintiff on or about the —— day of August, 1910, went with the defendant, Simon Mettler to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant's request, and in accordance with said agreement hereinbefore referred to, endorsed certain promissory notes and a guarantee in writing to the Bank of Vancouver, of Vancouver, B. C., to the amount of $25,000; plaintiff pursuant to said agreement so made with said defendant endorsed as a surety an indemnity bond to the American Surety Company in the sum of $10,000, to enable said defendants and said Wells Construction Company to enter into a contract with the City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of $25,000 to enable said defendants and said Wells Construction Company to enter into a certain contract with on*w* Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company are yet uncompleted, and plaintiff is as yet unrelieved from the liability on account of said notes, guaranty and indemnity bonds." * * *

"XII. That the liability of plaintiff on account of the bonds, notes and guarantees exe-

cuted by him pursuant to said agreement with the defendants Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the sum will probably exceed $30,000, over and above the securities and indemnity already held by plaintiff." [77]

TWENTIETH FINDING:

That Peter Sandberg paid direct certain materialmen furnishing supplies and laborers performing work, to wit, Tacoma Mill Company, to wit, one named Grosser, to wit, Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit "A" entered into with Wells Construction Company.

TWENTY-FIRST FINDING:

That on the 26th day of May, 1914, in cause No. 35,986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this cause as "Plaintiff's Exhibit 8" as follows:

"INTERROGATORY No. I.

Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case?

ANSWER TO INTERROGATORY No. I.

Yes.

INTERROGATORY No. II.

If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

ANSWER TO INTERROGATORY No. II. [78]

The Wells Construction Company started the construction of a seven-story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thousand ($33,000.00) Dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of Thirty-five Hundred ($3,500.00) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to $1,379.00, making the total contract price for said building, including extras, $37,879.00.

INTERROGATORY No. III.

What did you ever pay the Wells Construction Company for the work done by them for you?

ANSWER TO INTERROGATORY No. III.

I paid the Wells Construction Company $35,794.40 in cash, and paid materialmen for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of $1677.84, which I paid at the request and instance of the Wells Construction Company.

That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days' labor at cleaning up around building at $2.50 per day	$ 100.00
Cleaning of floors in third story of the old and new building	300.00
2 Doors taken out in the old Kentucky Building	100.00
Breaking of skylight in Langlow Building adjoining	17.90
Cost of installing switches for lights in Kentucky Building	700.00
Wiring floors for bell push buttons	200.00
10 fire doors short	200.00
Total,	$1617.90

[79]

That in addition thereto defendants cancelled a

claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. * * *

INTERROGATORY No. VI.

State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced work, and the date of completion of same.

ANSWER TO INTERROGATORY No. VI.

The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. * * *

INTERROGATORY No. IX.

Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

ANSWER TO INTERROGATORY No. IX.

No, the stock was turned over to Newton H. Peer, and Charles T. Peterson under the following agreement.

In the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near

Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the Corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting [80] as far as possible his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as Trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said con-

tracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as Trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said Trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

TWENTY-SECOND FINDING:

That Peter Sandberg took over the building known as the Kentucky Building under the contract, Defendants' Exhibit "A," and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

TWENTY-THIRD FINDING:

That Peter Sandberg has not kept and performed said agreement of indemnity, "Plaintiff's Exhibit 2," or done or performed any of the things required in and by the terms of the application of the indemnity agreement aforesaid.

TWENTY-FOURTH FINDING:

That neither Wells Construction Company nor Simon Mettler nor George E. Vergowe nor Joe Wells or any of them have paid or caused to be paid or indemnified or reimbursed plaintiff against the [81] amount of the judgment and the losses accruing upon its said bond as aforesaid.

TWENTY-FIFTH FINDING:

That in and by paragraph IX of said application and indemnity agreement hereinbefore referred to and in paragraph VI thereof set out, it was agreed

and provided among other and various things that the order, judgment or adjudication by reason of such suretyship should be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement, and that said suretyship was entered into for the *the* special benefit of Peter Sandberg and the special benefit and protection of Peter Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship.

TWENTY-SIXTH FINDING:

That the plaintiff executed its bond in the sum of twenty-five thousand dollars ($25,000.00) to Powell River Paper Company, Ltd., conditioned for the indemnifying of that company against any failure on the part of the Wells Construction Company to perform its contract.

TWENTY-SEVENTH FINDING:

Plaintiff and defendants have stipulated as to plaintiff's items of expenses incurred in defending the suit of Powell River Paper Company, Ltd., v. American Surety Company, in the Supreme Court of British Columbia, in the [82] amount of fifteen hundred fifty-six and 20/100 dollars ($1556.20).

TWENTY-EIGHTH FINDING:

That the receivership of Wells Construction Company occurred in Tacoma in January, 1911, and in British Columbia some two months later (pp. 27 and 28).

TWENTY-NINTH FINDING:

That Peter Sandberg and the community estate managed by him consisting of the Kentucky Building and the land upon which it is situated was debtor to Wells Construction Company October 3, 1910, in the sum of $36,547.60 (p. 53).

THIRTIETH FINDING:

That there was no statement furnished by Sandbert of moneys earned for Kentucky Building construction work under Defendants' Exhibit "A" between Wells Construction Company and Sandberg community until on or about November 29, 1910 (pp. 56 and 57).

THIRTY-FIRST FINDING:

That the Wells Construction Company after June, 1910, and to and inclusive of the month of November, 1910, and to and inclusive of the month of November, 1910, was pressed for money and was forced to procure endorsements and security for the conduct of its business and not able to pay its debts (pp. 72, 75, 76, 80, 91, 92, 129, 130, 150, 151).

THIRTY-SECOND FINDING:

That before the agreement of November 26, 1910, "Plaintiff's Exhibit 9," was executed, all of the stock of Wells Construction was transferred to Sandberg and manually delivered to Charles T. [83] Peterson and Charles T. Peterson and New-

ton Peer, of the firm of Messrs. Bates, Peer and Peterson, attorneys for both of the defendants, became President and Secretary respectively of Wells Construction Company (pp. 160, 165, 174, 185).

THIRTY-THIRD FINDING:

That on the 19th day of October, 1910, Peter Sandberg executed, subscribed and sealed a written document exhibited in this cause upon the trial (p. 168) and contained in evidence herein as "Plaintiff's Exhibit 11."

THIRTY-FOURTH FINDING:

That on the 28th day of October, 1910, Wells Construction Company brought and instituted a suit in the Superior Court of the State of Washington against Joseph Wells as evidenced by the complaint received in this cause in evidence as "Plaintiff's Exhibit 12."

THIRTY-FIFTH FINDING:

That in respect of the transactions, matters and things hereinbefore found the plaintiff in the making of its defense in the Supreme Court of British Columbia in the Dominion of Canada against Powell River Paper Company, Ltd., as aforesaid, under and pursuant to the terms of Plaintiff's Exhibit 2, laid out and expended the sum of $1556.20 and that said Peter Sandberg agreed to repay the same under and pursuant to the terms and conditions of said indemnitor's agreement aforesaid and the same has not been repaid either by Sandberg or any one else.

THIRTY-SIXTH FINDING:

That the work which the Wells Construction Company in June [84] was doing for Peter Sand-

berg was community work and the building described in Defendant's Exhibit "A" was a community building and consisted of and became community property.

THIRTY-SEVENTH FINDING:

That there was a benefit accruing to the community from Sandberg's acts in allowing Wells Construction Company to get the bond of the American Surety Company of New York so that the Wells Construction Company might proceed with its contracts and repay to Sandberg and his wife the moneys advanced between Wells Construction Company and Sandberg and his wife for the construction of the building described in Defendants' Exhibit "A."

AND THE PLAINTIFF NOW REQUESTS THE COURT TO MAKE FROM THE FOREGOING FINDINGS OF FACT THE FOLLOWING.

Conclusions of Law.

FIRST CONCLUSION OF LAW:

That whatever proceeds were derived from the sale of property through the bankruptcy proceedings of Simon Mettler and through proceedings under the trust in Kentucky Liquor Company and Elmer Hayden, its successor trustee, proportionately reduced the liabilities of Peter Sandberg against and for which liabilities Peter Sandberg took and received the indemnities herein mentioned.

SECOND CONCLUSION OF LAW:

That Peter Sandberg, through Kentucky Liquor Company, took and received indemnity against lia-

bility for Wells Construction Company to plaintiff; that Peter Sandberg took and received indemnity from Wells Construction Company and from Simon Mettler and from George Vergowe against liability for Wells Construction Company [85] to plaintiff, and Peter Sandberg took and received indemnity from both said companies for liability to Peter Sandberg and the community estate to plaintiff for the execution of its said bond for Wells Construction Company.

THIRD CONCLUSION OF LAW:

That Simon Mettler, George Vergowe, Joseph Wells and Wells Construction Company were with Peter Sandberg joint and several obligors and indemnitors to plaintiff under the obligation of June 20, 1910, Plaintiff's Exhibit 2, and became and were bound thereby.

FOURTH CONCLUSION OF LAW:

That to establish a community debt or obligation it is not essential or necessary that profit or benefit was actually earned or received by the community. It suffices if such profit or benefit might have resulted, and things in this cause as aforesaid found done by Peter Sandberg and between him and Wells Construction Company, Kentucky Liquor Company, Simon Mettler, George Vergowe, Joseph Wells and mutually between themselves and with others in respect of liability to plaintiff herein were designed and intended for the advantage and benefit of the community and to preserve and keep the community personal property of Peter Sandberg and wife from

liabilities to plaintiff herein in those transactions incurred by Peter Sandberg.

FIFTH CONCLUSION OF LAW:

That in the matters and things done and transacted aforesaid by Peter Sandberg with the plaintiff herein, the said Peter Sandberg at all times did and transacted said matters and things in [86] the management and control of the community business and in the exercise of his powers as agent of the community estate.

SIXTH CONCLUSION OF LAW:

That the obligation or debt of indemnity, Plaintiff's Exhibit 2, was entered into by Peter Sandberg with plaintiff herein in the prosecution of the business, and affairs, and transactions, of the community estate consisting of himself and his wife with Wells Construction Company and was and is a community obligation or debt incurred for the benefit of the community.

SEVENTH CONCLUSION OF LAW:

That knowledge of and notice to Peter Sandberg and Messrs. Bates, Peer & Peterson herein was knowledge of and notice to Mathilda Sandberg; and Mathilda Sandberg, as wife of Peter Sandberg, had through them means of notice and knowledge of all the foregoing found facts herein and of all the acts herein found done by Peter Sandberg with plaintiff and others in respect thereto and Mathilda Sandberg, as the wife of Peter Sandberg, is bound thereby and estopped to assert the contrary.

EIGHTH CONCLUSION OF LAW:

That Mathilda Sandberg, wife of Peter Sandberg,

in his relations with plaintiff, was put upon inquiry by the accompanying facts and circumstances as heretofore found, and it was her duty to inquire; and she should or ought to have known of and about all the matters and things done and transacted by her husband Peter Sandberg and her attorneys Messrs. Bates, Peer & Peterson in respect thereto; but, whether she prosecuted said inquiry or acted upon said knowledge, Messrs. Bates, Peer & Peterson acted **[87]** in all the transactions heretofore found as attorneys for both Peter Sandberg and Mathilda Sandberg, his wife, and for the community estate.

NINTH CONCLUSION OF LAW:

That the judgment of the Supreme Court of British Columbia of Monday, the 5th day of May, 1913, and formally entered September 20, 1913, in the sum of twenty-five thousand dollars ($25,000.00) against plaintiff herein in the cause in that said court wherein Powell River Paper Company, Ltd., was plaintiff and Wells Construction Company and American Surety Company of New York, plaintiff herein, were there defendants, is herein evidence conclusive and a bar against both Peter Sandberg and Mathilda Sandberg, his wife.

TENTH CONCLUSION OF LAW:

That plaintiff is entitled to have and recover of and from Peter Sandberg and the community estate represented by him and his said wife the said sum of twenty-five thousand dollars ($25,000.00) and interest thereon at six per cent (6%) per annum from the 20th day of September, 1913, until paid.

ELEVENTH CONCLUSION OF LAW:

That under the terms and conditions of Plaintiff's Exhibit 2 heretofore mentioned in these findings, there was expended the sum of fifteen hundred fifty-six and 20/100 dollars ($1556.20) in defense of the liabilities adjudicated against plaintiff by said Supreme Court of British Columbia, and Peter Sandberg thereby agreed as indemnitor to repay the same, but has not done so, nor have the same been paid, and plaintiff is entitled to have and recover of and from Peter Sandberg and the community estate represented [88] by him and his wife the said sum of fifteen hundred fifty-six and 20/100 dollars ($1556.20) with interest thereon at the rate of six per cent (6%) per annum from September 20, 1913, until paid.

TWELFTH CONCLUSION OF LAW:

That clause X of the indemnity agreement, plaintiff's exhibit 2, by its terms precludes and estops Peter Sandberg and his wife Mathilda Sandberg from disputing or showing that the community estate, its rents, issues, profits or incomes, was or is not bound to plaintiff herein; and the terms and conditions of said clause X are conclusive and binding upon the defendants and their estate, real, personal and mixed, for plaintiff in faith thereof executed its bond and sustained the liabilities determined herein.

THIRTEENTH CONCLUSION OF LAW:

In view of all the circumstances, the business relations and operations of Sandberg in this whole matter were so dependent upon, interrelated and associated with Wells Construction Company affairs

and the affairs of the community and the doings and transactions of Sandberg with the plaintiff so involved with these relations and operations that it cannot be said that Sandberg was a mere accommodation maker or surety for Wells Construction Company. What was done by Sandberg was therefore in furtherance of the supposed business interests of the community and the liability thereon is that of the community.

All of which is found and concluded this —— day of September, 1915, in our said court at Tacoma.

_____,

District Judge. **[89]**

And plaintiff prays that the Court may grant its requests for findings of fact and conclusions of law as aforesaid, accordingly.

_____,

W. C. BRISTOL,
Attorneys for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 21, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[90]**

Order Denying Plaintiff's Requests for Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED that plaintiff's requests for Findings of Fact numbered I, VI, VII, VIII, IX, X, XI, XII, XVII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, and XXXVII, and plaintiff's

requests for Conclusions of Law numbered I, II, III, IV, V, VI, VII, VIII, IX and XII, and each of them be, and the same are hereby denied.

IT IS FURTHER ORDERED that defendants' requests for Findings of Fact numbered II, V, VI, VII, VIII and XIII, and defendants' request for Conclusions of Law numbered I, and each of them be, and the same are hereby denied.

ORDERED this 22d day of October, 1915.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [91]

Defendants' Requested Findings of Fact and Conclusions of Law.

Comes now defendant Mathilda Sandberg separately and in her own hebalf, and the defendants Peter Sandberg and Mathilda Sandberg, his wife, as a community, and request the Court to make the following Findings of Fact and Conclusions of Law herein.

FINDINGS OF FACT.

I.

That on or about the 20th day of June, 1910, the defendant Peter Sandberg subscribed and acknowledged that certain application or indemnity agreement bearing date on that date to plaintiff, which said application or indemnity agreement was intro-

duced in evidence herein and marked "Plaintiff's Exhibit No. 2."

That defendant Mathilda Sandberg had no knowledge of the subscribing and acknowledgment of said agreement by defendant Peter Sandberg until the institution of this action in this Court, to wit, on or about the 26th day of June, 1914.

II.

That said application or indemnity agreement so signed and acknowledged by defendant Peter Sandberg, contained among other provisions the following:

> "IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be **[92]** required to pay the same."
>
> "VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety to prosecute or defend or take part

in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business.

"IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety."

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which

the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

III.

That defendants Peter Sandberg and Mathilda Sandberg were married at Tacoma, Washington, in November, 1894, and ever since said time have been and now are husband and wife, and during all of said time have lived together as such, and said defendants are the owners of certain real property in the Counties of Pierce and King, in the State of Washington, more particularly described, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875. [93]

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along

the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112, Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638, Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West ½ of S. E. ¼ less 1 38/100 acres, and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ Section 8, Township 8, Range 5 East, Pierce County.

West half of Section 2, Township 20, Range 7 King County, Washington.

North ½ of N. E. ¼ of Section 12, Township 20,

Range 7, and S. W. ¼ of N. E. ¼ and N. E. ¼ of N. W. ¼, Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East ½ of Southeast ¼, Section 10, Township 20, Range 8, King County, Washington.

All of which said property was acquired by defendants after their marriage, and by their joint efforts, and not by gift, bequest or inheritance.

IV.

That at the time of their marriage defendant Peter Sandberg had no property, except a small house on a lot situated at about South 25th and I Streets, in the city of Tacoma, which house **[94]** and lot were worth not to exceed one thousand dollars, and were incumbered by a mortgage of six hundred dollars. That said house, after the marriage of said defendants, was sold, and the funds derived from such sale were used and expended by defendant Peter Sandberg without any separate account of the same being kept.

V.

That on or about the 24th day of June, 1910, in pursuance of said application, or indemnity agreement "Plaintiff's Exhibit No. 2," hereinabove referred to, plaintiff made, executed and delivered its certain bond with the Wells Construction Company, a corporation, as principal, and itself as surety, to Powell River Paper Company, Ltd., of Vancouver, B. C., which said bond was in the penal sum of twenty-five thousand dollars, a copy of the same

being received in evidence herein and marked, "Plaintiff's Exhibit No. 3."

VI.

That on or about the 27th day of April, 1911, the Powell River Paper Company, Ltd., in the Supreme Court of British Columbia issued its writ and brought a suit against the Wells Construction Company and against plaintiff American Surety Company, and on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his place of business, 1128 Pacific Avenue, Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., which notice, together with a proof of service thereon was introduced in evidence herein marked "Plaintiff's Exhibit No. 4." That defendant Mathilda Sandberg had no knowledge or notice thereof, or of the pendency of said action, and defendant Peter Sandberg did not appear or defend the same.

That thereafter such proceedings were had in the Supreme Court of British Columbia that on the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells [95] Construction Company for thirty-one thousand six hundred and thirty-two and 94/100 ($31,632.94) dollars, and against the American Surety Company, plaintiff, for the amount of its said bond, to wit, the sum of twenty-five thousand ($25,000) dollars.

VII.

That plaintiff incurred certain items of expense in defending said suit stipulated by plaintiff and defendants herein to be the sum of fifteen hundred and

fifty-six and 20/100 ($1556.20) dollars.

VIII.

That neither of the defendants Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company, and that defendant Peter Sandberg signed the application or indemnity agreement, Plaintiff's Exhibit No. 2, at the request of and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application.

That at the time defendant Peter Sandberg signed said application the Wells Construction Company was constructing a building for defendants, the contract price for which building, together with extras was thirty-six thousand five hundred dollars, on which the defendants had prior to June 20th, 1910, paid the sum of thirty-six thousand three hundred eighty-three and 05/100 ($36,383.05) dollars. That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells Construction Company, in the matter of the [96] construction of said building and the signing

of said indemnity agreement, "Plaintiff's Exhibit No. 2."

That at said time the Wells Construction Company was in good and substantial beneficial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.

IX.

That on June 20th, 1910, the Wells Construction Company, Simon Mettler, and George Vergowe, executed to defendant Peter Sandberg an indemnity agreement introduced in evidence herein as Plaintiff's "Exhibit No. 10." That on November 26th, 1910, the Kentucky Liquor Company, the Wells Construction Company, Simon Mettler and George Vergowe, made and entered into an agreement introduced in evidence herein, marked "Plaintiff's Exhibit No. ——," which said agreements were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife Mathilda Sandberg, for the purpose of saving defendant Peter Sandberg harmless on account of liability he had incurred on account of the Wells Construction Company, because of the matters and things referred to in said agreements, but that said agreements, or either of them, were not for the benefit, or gain, or in the interest of the community consisting of defendants, or for the use, benefit or interest of the defendant Mathilda Sandberg.

X.

That since the filing of the opinion herein by the Court, the plaintiff has moved to reopen the cause for

the purpose of submitting a proper exemplification of the record of the judgment of the Courts of British Columbia referred to in the Court's opinion in accordance therewith, and has supplied the record with an authenticated copy, which defendants concede to be in compliance with the law. [97]

XI.

That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that *that*

the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination [98] of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer, and Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

XII.

That defendant Peter Sandberg has not kept and performed the agreement of indemnity, "Plaintiff's Exhibit No. 2," nor any of the things required by the terms and conditions thereof, and that the Wells Construction Company, nor Simon Mettler, nor George E. Vergowe, nor Joseph Wells, or any of them have paid, or caused to be paid, or indemnified or reim-

bursed plaintiff against the amount of the judgment and the losses accruing on said bond.

XIII.

That the Wells Construction Company became insolvent and went into the hands of a receiver in January, 1911.

XIV.

That defendant Peter Sandberg without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guaranties to banks in British Columbia, referred to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guaranties so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guaranties, and in signing and entering into the several agreements referred to in the testimony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guaranties and other agreements, excepting said [99] contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the

transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as trustee, the Kentucky Liquor Co., the Molsons Bank, and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction Co., was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the indemnity agreement sued on herein, "Plaintiff's Exhibit No. 2," and that said building contract, and the relationship of the parties thereto was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was en-

tirely independent thereof, and was not spoken [100] of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building contract was not a consideration, and was not regarded as a consideration for any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to.

From the foregoing Findings of Fact, the Court makes the following.

CONCLUSIONS OF LAW.

I.

That plaintiff is entitled to a judgment against defendant Peter Sandberg in the sum of twenty-six thousand five hundred and fifty-six and 20/100 dollars, ($26,556.20) *dollars,* together with interest thereon at the rate of 6% per annum, from the 20th day of September, 1915.

II.

That plaintiff's action should be dismissed as to defendant Mathilda Sandberg.

III.

That said judgment should provide that it is a separate debt of defendant Peter Sandberg, and not a debt, liability or obligation of defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real

property of defendants hereinabove specifically set forth.

Let a judgment be entered accordingly.

By the Court,

_____,

Judge. [101]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 11, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [102]

Findings of Fact and Conclusions of Law.

The Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I.

That on or about the 20th day of June, 1910, the defendant Peter Sandberg subscribed and acknowledged that certain application or indemnity agreement bearing date on that date to plaintiff, which said application or indemnity agreement was introduced in evidence herein and marked "Plaintiff's Exhibit No. 2."

II.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

> "IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from

and against every claim, demand, liability, cost, charge, counsel fee, (including fees of special counsel whenever by the Surety deemed necessary), expense, suit order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same."

III.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom or from its said suretyship. [103] The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the

surety's license or right to transact business."

IV.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety."

V.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substan-

tially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

VI.

That defendant Mathilda Sandberg had no knowledge of the subscribing and acknowledgment of said agreement by defendant Peter Sandberg until the institution of this action in this court, to wit, on or about the 26th day of June, 1914.

VII.

That defendants Peter Sandberg and Mathilda Sandberg were married at Tacoma, Washington, in November, 1894, and ever since said time have been and now are husband and wife, and during all of said time have lived together as such, and said defendants are the [**104**] owners of certain real property in the Counties of Pierce and King, in the State of Washington, more particularly described as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8 in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North Line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73

degrees, 50 minutes 02 seconds with the last-described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes, 02 seconds with the last-described course 173.510 feet; thence Southerly along a line at right angles with the last-described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12 Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West ½ of S. E. ¼ less 1–38/100 acres and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼, Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North ½ of N. E. ¼ of Section 12, Township 20, Range 7, and S. W. ¼ of N. E. ¼ and N. E. ¼ of N. W. ¼, Section 12, Township 20, Range 7, King County, Washington;

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East ½ of Southeast ¼, Section 10, Township 20, Range 8, King County, Washington. [105]

All of which said property was acquired by defendants after their marriage, and by their joint efforts, and not by gift, bequest or inheritance.

VIII.

That at the time of their marriage defendant Peter Sandberg had no property, except a small house on a lot situated at about South 25th and I Streets, in the city of *of* Tacoma, which house and lot were worth not to exceed one thousand dollars, and were incumbered by a mortgage of six hundred dollars. That said house, after the marriage of said defendants, was sold, and the funds derived from such sale were used and expended by defendant Peter Sandberg without any separate account of the same being kept.

IX.

That on or about the 27th day of April, 1911, the Powell River Paper Company, Ltd., in the Supreme Court of British Columbia issued its writ and brought a suit against the Wells Construction Company and against plaintiff American Surety Company, and on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his place of business, 1128 Pacific Avenue, Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., which notice, together with a proof of service thereon was introduced in evidence herein, marked "Plaintiff's Exhibit No. 4." That defendant Mathilda Sandberg

had no knowledge or notice thereof, or of the pendency of said action, and defendant Peter Sandberg did not appear or defend the same.

That thereafter such proceedings were had in the Supreme Court of British Columbia that on the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells Construction Company for thirty-one thousand, six hundred and thirty-two and 94/100 dollars ($31,632.94) *dollars,* and against theAmerican [106] Surety Company, plaintiff, for the amount of its said bond, to wit, the sum of twenty-five thousand dollars ($25,000).

X.

That since the filing of the opinion herein by the Court, the plaintiff has moved to reopen the cause for the purpose of submitting a proper exemplification of the record of the judgment of the Courts of British Columbia referred to in the Court's opinion in accordance therewith, and has supplied the record with an authenticated copy, which defendants concede to be in compliance with the law.

XI.

That on June 20, 1910, when the contract of indemnity, "Plaintiff's Exhibit 2," was signed by Peter Sandberg, the Wells Construction Company was then constructing a building for Peter Sandberg and Mathilda Sandberg, his wife,—carrying on a business as the "Kentucky Liquor Company"—under and pursuant to the terms of a contract designated herein Defendants' Exhibit "A," and that at said time, June 20, 1910, said building was not completed.

XII.

That neither of the defendants, Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company, and that defendant Peter Sandberg signed the application or indemnity agreement, Plaintiff's Exhibit No. 2, at the request of, and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application.

That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the [107] building mentioned in the preceding finding, for defendants, the contract price for which building, together with extras, was thirty-six thousand, five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand, three hundred, eighty-three and 05/100 dollars ($36,383.05). That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells Construction Company, in the matter of the construction of said building and the signing of said

indemnity agreement, "Plaintiff's Exhibit No. 2."

That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.

XIII.

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants from any liability under "Plaintiff's Exhibit 2," and said agreement was introduced and received in evidence herein as "Plaintiff's Exhibit 10."

XIV.

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars ($35,000) then due.

XV.

That on November 26, 1910, Kentucky Liquor Company with Wells Construction Company, Simon Mettler and George Vergowe made and entered into an agreement in writing as introduced in evidence herein in words and figures as follows, to wit: [108]

"THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, a Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife,

parties of the first part, and SIMON METTLER, party of the second part,

"WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia corporation, and the Molsons Bank, a British Columbia corporation both of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

"Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26), Block 8150 Indian Addition; Lots Nineteen (19) to Twenty-six, Block 8249, Indian Addition; North ½ of N. E. ¼ of S. W. ¼ of N. W. ¼, Section 14, Township 20, Range 3 E.

"And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

"The North Thirty (30) acres of the Northwest quarter of the Northwest quarter of Section Thirteen

(13), Township Twenty (20), Range Three (3) East; also the Northwest Quarter of the Southwest quarter of the Northwest quarter of the same section, township and range.

—which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

"A note for the sum of Twenty-five Thousand ($25,000) Dollars, made by the Wells Construction Company to said Bank of Vancouver dated at Vancouver, B. C., ———, 1910, due ninety days after date;

"A note for Fifty-five Thousand ($55,000) Dollars, made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C. ———, 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said The Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows: [109]

"One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand ($25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand ($27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand Dollars ($10,000); One to the Pacific Investment

Company, Ltd., in the principal sum of Three Thousand ($3,000) Dollars;

"And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand, Five Hundred Dollars ($79,500), besides interest.

"And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

"And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent,

"And Whereas, said Simon Mettler is desirous of withdrawing from said corporation and relieving the same from liability on account of the indebtedness owing him, from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

"IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title

to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

"That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorsor, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, trustee, shall apply by conversion, or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

"IN WITNESS WHEREOF, The Wells Construction Company, a [110] corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their President and Secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively, hereto.

"IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Wash-

ington, this 26th day of November, A. D. 1910.

"KENTUCKY LIQUOR COMPANY, a Corporation,

By (PETER SANDBERG),
Its President.

Attest (P. H. LUCK),
Secretary.

WELLS CONSTRUCTION COMPANY, a Corporation,

By (CHARLES T. PETERSON),
Its President.

Attest (NEWTON H. PEER),
Secretary.

(GEORGE E. VERGOWE).
(SIMON METTLER.)"

XVI.

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

XVII.

That Peter Sandberg paid direct certain materialmen furnishing supplies and laborers performing work, to wit, Tacoma Mill Company, to wit, one named Grosser, to wit one named Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit "A" entered into with Wells Construction Company.

XVIII.

That Peter Sandberg took over the building known

as the [111] Kentucky Building under the contract Defendants' Exhibit "A," and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

XIX.

That the work which the Wells Construction Company was doing in June for Peter Sandberg was community work and the building described in Defendants' Exhibit "A" was a community building and consisted of and became community property.

XX.

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler, were defendants and the same is in evidence in this cause as "Plaintiff's Exhibit 7" and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:

> "III. That on or about said last date above referred to, to wit, the —— day of August, A. D. 1910, the defendants Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were inter-

ested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business. * * *

"IV. That pursuant to said agreement so entered into, plaintiff on or about the —— day of August, 1910, went with the defendant Simon Mettler to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant's [112] request, and in accordance with said agreement hereinabove referred to, endorsed certain promissory notes and a guarantee in writing to The Bank of Vancouver, of Vancouver, B. C., to the amount of Twenty-five Thousand ($25,000) Dollars, and plaintiff pursuant to said agreement so made with said defendants endorsed as a surety an indemnity bond to the American Surety Company in the sum of Ten Thousand ($10,000) Dol-

lars, to enable said defendants and said Wells Construction Company to enter into a contract with the said City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of Twenty-five Thousand ($25,000) Dollars to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company, are yet uncompleted and plaintiff is as yet unrelieved from the liability on account of said notes, guarantee and indemnity bonds. * * *

"XII. That the liability of plaintiff on account of the bonds, notes and guarantees executed by him pursuant to said agreement with the defendants Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for sometime in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the same will probably exceed Thirty Thousand ($30,000) Dollars, over and above the securities and indemnity already held by plaintiff."

XXI.

That on the 26th day of May, 1914, in cause No. 35986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons

Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this cause as "Plaintiff's Exhibit No. 8" as follows, to wit:

"INTERROGATORY No. I.

"Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case? [113]

"ANSWER TO INTERROGATORY No. I.

"Yes.

"INTERROGATORY No. II.

"If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

"ANSWER TO INTERROGATORY No. II.

"The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thou-

sand ($33,000) Dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of Thirty-Five Hundred ($3500) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to $1379, making the total contract price for said building, including extras $37,879.00.

"INTERROGATORY No. III.

"What did you ever*y* pay the Wells Construction Company for the work done by them for you?

"ANSWER TO INTERROGATORY No. III.

"I paid the Wells Construction Company $35,794.-40 in cash, and paid material-men for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of $1677.84, which I paid at the request and instance of the Wells Construction Company.

"That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around building, at $2.50 per day	$100.00
Cleaning of floors in third story of the old and new building	300.00

2 Doors taken out in the old Kentucky Building	100.00
Breaking of skylight in Langlow Building adjoining	17.90
Cost of installing switches for lights in Kentucky Building....	700.00

[114]

Wiring floors for bell push-buttons	200.00
10 fire doors short	200.00

Total, $1,617.90

"That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. * * *

"INTERROGATORY No. VI.

"State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and the date of the completion of same.

"ANSWER TO INTERROGATORY No. VI.

"The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. * * *

"INTERROGATORY No. IX.

"Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

"ANSWER TO INTERROGATORY No. IX.

"No, the stock was turned over to Newton H. Peer and Charles T. Peterson under the following agreement:

"In the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the Corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, [115] as Trustees, for the use and benefit of

said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as Trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson as said Trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

XXII.

That on June 20, 1910, the Wells Construction Company, Simon Mettler and George Vergowe, executed to defendant Peter Sandberg an indemnity agreement introduced in evidence herein as "Plaintiff's Exhibit No. 10." That on November 26th, 1910, the Kentucky Liquor Company, the Wells Construction Company, Simon Mettler and George Vergowe, made and entered into an agreement introduced in evidence herein, marked "Plaintiff's Ex-

hibit No. ——," which said agreements were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife Mathilda Sandberg, for the purpose of saving defendant Peter Sandberg harmless on account of liability he had incurred on account of the Wells Construction Company, because of the matters and things referred to in said agreements, but that said agreements, or either of them were not for the benefit, or gain, or in the interest of the community consisting of defendants, or for the use, benefit or interest of the defendant Mathilda Sandberg.

XXIII.

That defendant Peter Sandberg, without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guaranties to banks in British Columbia, referred [116] to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guaranties so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guaranties, and in signing and entering into the several agreements referred to in the testimony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guaranties and other agreements, excepting said contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to

Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as Trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as Trustee, the Kentucky Liquor Co., the Molsons Bank, and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the [117] carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction Company was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the in-

demnity agreement sued on herein, "Plaintiff's Exhibit No. 2," and that said building contract, and the relationship of the parties thereto was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was entirely independent thereof, and was not spoken of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building Contract was not a consideration, and was not regarded as a consideration of any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to.

XXIV.

That during all the times herein mentioned Messrs. Bates, Peer & Peterson were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Kentucky Liquor Company, and Messrs. Peterson and Peer were on November 26, 1910, president and secretary, respectively, of Wells Construction Company.

XXV.

That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at [118] Van-

couver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting, as far as possible, his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct.

That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and [119] Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson, as said trustees, carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

XXVI.

That defendant Peter Sandberg has not kept and performed the agreement of indemnity "Plaintiff's Exhibit No. 2," nor any of the things required by the terms and conditions thereof, and that the Wells Construction Company, nor Simon Mettler, nor George E. Vergowe, nor Joseph Wells, nor any of them have paid, or caused to be paid, or indemnified or reimbursed plaintiff against the amount of the judgment and the losses accruing on said bond.

XXVII.

Plaintiff and defendants have stipulated as to plaintiff's items of expenses incurred in defending the suit of the Powell River Paper Company, Ltd., v. American Surety Company, in the Supreme Court of British Columbia, in the amount of fifteen hundred, fifty-six and 20/100 dollars ($1556.20).

XXVIII.

That in respect to the transactions, matters and things hereinbefore found the plaintiff, in the mak-

ing of its defense in the Supreme Court of British Columbia in the Dominion of Canada against the Powell River Paper Company, Ltd., as aforesaid, under and pursuant to the terms of Plaintiff's Exhibit No. 2, laid out and expended the sum of fifteen hundred, fifty-six and 20/100 dollars and that said Peter Sandberg agreed to repay the same under and pursuant to the terms and conditions of said indemnitor's agreement aforesaid and the same has not been repaid, either by Sandberg or anyone else.

From the foregoing Findings of Fact, the Court makes the following: [120]

CONCLUSIONS OF LAW.

I.

That plaintiff is entitled to have and recover of, and from Peter Sandberg the sum of twenty-five thousand dollars ($25,000) and interest thereon at six per cent (6%) per annum from the 20th day of September, 1913, until paid.

II.

That, under the terms and conditions of "Plaintiff's Exhibit No. 2," heretofore mentioned in these findings, there was expended the sum of fifteen hundred, fifty-six and 20/100 dollars ($1556.20) in defense of the liabilities adjudicated against plaintiff by said Supreme Court of British Columbia, and Peter Sandberg thereby agreed, as indemnitor, to repay the same, but has not done so, nor have the same been paid, and plaintiff is entitled to have and recover of and from Peter Sandberg the said sum of fifteen hundred, fifty-six and 20/100 dollars ($1556.20) with interest thereon at the rate of six

per cent (6%) per annum from September 20, 1913, until paid.

III

That plaintiff's action should be dismissed as to defendant Mathilda Sandberg.

IV.

That said judgment should provide that it is a separate debt of defendant Peter Sandberg, and not a debt, liability or obligation of defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real property of defendants hereinabove specifically set forth.

Let judgment be entered accordingly.

Dated: October 22, 1915.

EDWARD E. CUSHMAN,
Judge. [121]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [122]

Exceptions of Plaintiffs to Findings of Fact and Conclusions of Law Made Herein October 22, 1915.

Comes now American Surety Company of New York, above-named plaintiff, and presents these its exceptions and objections by its attorney to the action of the Court in making its findings of fact and

conclusions of law herein in October 22, 1915, as the said Court did, to wit:

FIRST EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find the facts as in the first finding of fact requested by the plaintiff and to the modification thereof by the Court and to the failure of the Court to find thereon in accordance with the evidence.

SECOND EXCEPTION:

Plaintiff excepts to the action of the Court in failing and refusing to find the facts as requested in the sixth to the twelfth findings of facts by the plaintiff, all inclusive, and in failing and refusing to find the facts as requested therein and to any modification of the same made by the Court and to the failure of the Court to find facts shown by the evidence as requested by plaintiff in said requested findings.

THIRD EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find as in the seventeenth finding of fact requested by plaintiff and to the failure of the Court to make any finding the equivalent thereof from the evidence and to the Court's modification thereof by the findings of fact it did make. [123]

FOURTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find as in the twenty-third to the thirty-fourth findings of fact requested by the plaintiff, all inclusive, and to the modifications by the Court thereof and to the failure and refusal of the Court to find facts the equivalent thereof as shown by the evidence.

FIFTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find the fact as set forth in the thirty-seventh finding of fact requested by plaintiff and to its failure and refusal to find any fact the equivalent thereof as shown by the evidence.

SIXTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to grant and make the first to the ninth, all inclusive, conclusions of law requested by plaintiff and to the failure of the Court to find conclusions of law from the facts the equivalent thereof and to the modification by the Court of the conclusions of law so made and requested by the plaintiff.

SEVENTH EXCEPTION:

Plaintiff excepts to the failure and refusal of the Court to find the twelfth conclusion of law as requested by plaintiff.

EIGHTH EXCEPTION:

Plaintiff excepts to the order entered on the 22d day of October, 1915, wherein the findings therein named and herein excepted to were denied and wherein the conclusions herein excepted to were denied by the Court when it made its findings of fact and conclusions of law which the Court did render and file. [124]

NINTH EXCEPTION:

Plaintiff excepts to finding of fact numbered I as made by the Court for the reason that it eliminates as part thereof that Peter Sandberg did the things specified "in the regular ordinary course of business."

TENTH EXCEPTION:

Plaintiff excepts to the action of the Court in making finding of fact numbered VI because the same is against the evidence and against the admitted knowledge of her means of inquiry and the actual knowledge of her attorneys, Messrs. Bates, Peer & Peterson.

ELEVENTH EXCEPTION:

Plaintiff excepts to the finding of fact numbered IX wherein it is found that the notice of the 17th of May, 1911, was served upon Peter Sandberg "at his place of business," whereas the evidence shows and the notice itself in evidence with proof of service attached thereto exhibits, that upon that date there was served upon Peter Sandberg as his residence and at the residence of Mathilda Sandberg in Tacoma, a notice as specified in said finding, which is Plaintiff's Exhibit 4, and that said finding IX is against the evidence for that Mathilda Sandberg had means of knowledge and her attorneys, Messrs. Bates, Peer & Peterson, knew of all the matters and things contained in said notice.

TWELFTH EXCEPTION:

Plaintiff excepts to the finding of fact numbered XII and to the whole thereof because it is an argumentative interpretation of the evidence and not a finding of fact and is against the law and against the evidence. [125]

THIRTEENTH EXCEPTION:

Plaintiff excepts to finding of fact numbered XXII as made by the Court for the reason that it is not a finding of fact but a conclusion of law and

so far as it undertakes or purports to be a finding of fact it asserts and pretends to find that the agreements therein referred to were made without the knowledge, consent or acquiescence of the defendant Mathilda Sandberg, which part of said finding is against the evidence and against the law and upon a matter which could not be put in issue by the pleading.

FOURTEENTH EXCEPTION:

Plaintiff excepts to finding of fact numbered XXIII as made by the Court for the reason that the same is not a finding of fact but an argumentative interpretation of the fact and a conclusion of law not supported by the evidence and against the evidence.

FIFTEENTH EXCEPTION:

Plaintiff excepts to conclusion of law numbered III as made by the Court for the reason that said conclusion of law does not follow from the facts found and is against the evidence on the whole record and against the law.

SIXTEENTH EXCEPTION:

Plaintiff excepts to the conclusion of law IV as made by the Court for the reason that said conclusion of law does not follow from the facts found and is against the evidence on the whole record and against the law.

W. C. BRISTOL,
Attorney for Plaintiff. [126]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 1, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [127]

Journal Order Extending Time to File Bill of Exceptions and Overruling Plaintiff's Exceptions to Findings of Fact and Conclusions of Law.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 13th day of June, A. D. 1916, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the exceptions of plaintiff to findings of fact and conclusions of law be and the same are overruled and exception is allowed, and plaintiff is allowed 90 days in which to file its bill of exceptions. [128]

Judgment.

This cause came on to be heard at the July term of the above-entitled court, and was argued by counsel for the respective parties, and thereupon and upon consideration thereof the Court made and filed herein on the 31st day of July, 1915, its decision in writing, and thereafter, and on the 22 day of Octo-

ber, 1915, made and filed its Findings of Fact and Conclusions of Law in writing, wherein and whereby it found and determined all of the facts herein, it is now therefore in accordance with said decision and Findings of Fact and Conclusions of Law as aforesaid,—

ORDERED, ADJUDGED AND DECREED that plaintiff, American Surety Company, of New York, a corporation, do have and recover of defendant Peter Sandberg, judgment in the sum of twenty-six thousand five hundred and fifty-six and 20/100 ($26,556.20) dollars, together with interest thereon at the rate of 6% per annum from the 20th day of September, 1913, until paid, together with the costs of this action to be taxed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said action be and the same is hereby dismissed as against defendant Mathilda Sandberg, and as against the community consisting of Mathilda Sandberg and her husband, Peter Sandberg.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following described real property situated in the counties of King and Pierce, State of Washington, is the community real property of the defendants Peter Sandberg and Mathilda Sandberg, his wife, to wit:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303; in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Terri-

tory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Beginning at the intersection of the North line of Lower [129] Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom,

Pierce County, Washington;

West ½ of S. E. ¼, less 1 38/100 acres, and S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼, Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North ½ of N. E. ¼ of Section 12, Township 20, Range 7, and S. W. ¼ of N. E. ¼ and N. E. ¼ of N. W. ¼, Section 12, Township 20, Range 7, King County, Washington;

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East ½ of Southeast ¼, Section 10, Township 20, Range 8, King County, Washington;

All of which said property was acquired after the marriage of the defendant Mathilda Sandberg to her codefendant Peter Sandberg, and by their joint efforts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the judgment herein entered against defendant Peter Sandberg is not, and does not constitute a lien, encumbrance or cloud upon the title to said real property above described, or any part thereof, or upon any of the community real property owned by the defendants [130] herein, and it is further ordered, adjudged and decreed that said real property above described, or no part thereof shall be levied upon or sold to satisfy the judgment entered herein, or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that defendant Mathilda Sandberg have and recover judgment against plaintiff

for her costs and disbursements herein to be taxed.

Dated, this 13th day of June, A. D. 1916.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 13, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [131]

Order Extending Time to Prepare, etc., Bill of Exceptions Sixty Days from September 11, 1916.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 14th day of August, A. D. 1916, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the time to prepare and present bill of exceptions in this case is extended sixty days from Sept. 11, 1916. [132]

Order Extending Time to Settle, etc., Bill of Exceptions Sixty Days from November 11, 1916.

This cause being further heard and it appearing that the bill of exceptions has been prepared and filed within the time heretofore allowed by the Court, but that there are pending negotiations between respective counsel to settle said bill, now upon consideration of the Court, it is

ORDERED, that the plaintiff may have an additional period of sixty (60) days from and after November 11, 1916, within which to settle said bill of exceptions and present the same to the Court for signature.

Dated October 28, 1916.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 28, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [133]

Order Extending Time for Settlement of Bill of Exceptions to January 12, 1917.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 5th day of January, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW YORK,

vs.

PETER SANDBERG et ux.

Upon consent of attorneys for both sides, it is now ordered that the time for settlement of the bill of exceptions herein be extended to January 12, 1917, at ten o'clock A. M. [134]

Order Extending Time to Settle Bill of Exceptions, etc., to March 6, 1917.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 11th day of January, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the time within which to settle the bill of exceptions in the above case be, and it is hereby extended from January 12, 1917, to March 6, 1917, on account of illness of one of the attorneys for defendants. [135]

Order Extending Time to Settle Bill of Exceptions.

It is by the Court ordered that the July, 1916, term of this court be, and the same is hereby extended for a period of ten days from the date hereof, for the purpose of settling the bill of exceptions in the above-entitled cause.

By the Court, this 5th day of February, 1917.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 5, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [136]

Bill of Exceptions as Settled and Certified.

For the purpose of making those matters and things that occurred upon the trial of this cause of record herein, it is certified that on the 4th day of June, 1915, the above-entitled cause came on duly and regularly for hearing in the above-entitled court before Honorable E. E. Cushman, Judge of said court, and there and then the defendants appeared in person and by their attorneys, Messrs. Bates, Peer & Peterson, and the plaintiff by its attorneys and solicitors of record, and the cause was tried before the Court sitting as a jury pursuant to stipulation of the parties, and after the opening statements of respective counsel the plaintiff offered in evidence Exhibit No. 1, and application signed by the Wells Construction Company and Joseph Wells to the plaintiff, American Surety Company of New York,

for a bond of indemnity upon a contract with Powell River Paper Company, Ltd., this being the application alleged in the complaint as rejected by the plaintiff because of insufficient indemnity.

The community of Sandberg and wife, Mathilda Sandberg, objected to the offer of Exhibit 1, on the grounds that it was not signed by either of them, and was not binding upon them, and for want of preliminary proof thereon as to its authenticity, which objection was overruled.

Thereupon plaintiff offered in evidence Plaintiff's Exhibit No 2, which is the application set forth in the complaint of defendant, Mathilda Sandberg, in her own behalf and in behalf of [137] the community of Sandberg and wife, objected to said offer on the grounds that it was incompetent, irrelevant and immaterial, and did not tend to prove any issue in so far as she and the community were concerned, which objection was, by the Court, overruled. A copy of said application constitutes pages 2½ of this record.

Thereupon there was introduced in evidence, the bond described in the complaint, and the same was received and marked Plaintiff's Exhibit No. 3, being a document obligating American Surety Company as surety to Powell River Paper Co., Ltd., in the sum of twenty-five thousand ($25,000) dollars being the bond referred to in the complaint to which defendant Matilda Sandberg, in her own behalf and in behalf of the Sandberg community, made the same objection as was made to Exhibit No. 2, which

was overruled, and the same was received in evidence.

Thereupon there was offered in evidence Plaintiff's Exhibit No. 4, consisting of the notice alleged in the complaint served upon Wells Construction Company, Simon Mettler, George E. Vergowe, Peter Sandberg and Joseph Wells, to which defendant, Matilda Sandberg, and the Sandberg community made the same objection as was made to Exhibit 2, and the same was received and considered in evidence.

Thereupon there was offered and received in evidence Plaintiff's Exhibit No. 5, consisting of the certified copy of the judgment in the Supreme Court of British Columbia in the case of Powell River Paper Company, Ltd., plaintiff, against Wells Construction Company and American Surety Company of New York, defendants, to which defendant. Matilda Sandberg and the Sandberg community, made the same objection as was made to Exhibit No. 2. [138]

Thereupon there was offered a stipulation between counsel comprising the amount of expenses and outlays incurred by American Surety Company fixed at the sum of $1556.20, the defendants reserving the right to contest any liability, however, as to said item.

There was thereupon offered in evidence, a certified copy of the complaint in the Superior Court of the State of Washington in cause numbered 30878, wherein Peter Sandberg was plaintiff and Simon Mettler and others defendants, and the same was

marked Plaintiff's Exhibit No. 7, to which defendant, Matilda Sandberg and the Sandberg community, made the same objection as was made to Exhibit No. 2.

Whereupon the Court stated, "the objection will be overruled. These objections being general, not specific, nothing is called to the attention of the Court but admissions in the pleadings of one lawsuit claimed to be against the pleadings in another lawsuit will, in many cases have very little weight because the party in his pleadings always takes extreme positions." Whereupon said paper was admitted in evidence.

Thereupon there was offered and introduced in evidence a certified copy of the interrogatories and answers thereto in the Superior Court of the State of Washington, in and for Pierce County, in cause numbered 35986, wherein the Molson's Bank was plaintiff and Peter Sandberg and Matilda Sandberg, his wife, were defendant, which interrogatories were verified by defendant Peter Sandberg alone, and were not verified by Matilda Sandberg, and wherein the defendants Peter Sandberg and Mathilda Sandberg, his wife, made answers to said interrogatories, all of which were contained in a certified document then offered in evidence by the plaintiff, to which defendant Mathilda Sandberg, and the Sandberg community, made the same objection as was made to [139] Exhibit No. 2, which objection was overruled, and the same was received in evidence and marked Plaintiff's Exhibit No. 8, and there was there and then offered and read to

the Court the interrogatories and answers as follows, to wit:

INTERROGATORY No. I.

Did the Wells Construction Company do any work for you, or either of you, at any time before the execution of the note sued on in this case?

ANSWER TO INTERROGATORY No. I.

Yes.

INTERROGATORY No. II.

If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

ANSWER TO INTERROGATORY No. II.

The Wells Construction Company started the construction of a seven-story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the city of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was thirty-three thousand ($33,000) dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of thirty-five hundred ($3500) dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra

painting, amounting in all to $1379, making the total contract price for said building, including [140] extras $37,879.

INTERROGATORY No. III.

What did you ever pay the Wells Construction Company for the work done by them for you?

ANSWER TO INTERROGATORY No. III.

I paid the Wells Construction Company $25,794.40 in cash, and paid materialmen for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of $1677.84, which I paid at the request and instance of the Wells Construction Company.

That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around building, at $2.50 per day	$ 100.00
Cleaning of floors in third story of the old and new building	300.00
2 doors taken out in the old *D*entucky building	100.00
Breaking of skylight in Langlow Building, adjoining	17.90
Cost of installing switches for lights in Kentucky Building	700.00
Wiring floors for bell push buttons	200.00
10 Fire doors short	200.00
Total	$1617.90

That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of twenty-five dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th 1910.

INTERROGATORY No. IV.

Is it not true that you owe them for the construction of *of* [141] building in Tacoma?

ANSWER TO INTERROGATORY No. IV.

No.

INTERROGATORY No. V.

If you say you do not owe anything, then state when and how you paid them for the building they built for you.

ANSWER TO INTERROGATORY V.

Paid them as set forth in answer to Interrogatory No. III.

INTERROGATORY No. VI.

State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and date of the completion of same.

ANSWER TO INTERROGATORY No. VI.

The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves.

INTERROGATORY No. VII.

When and how did you or either of you become in-

terested in the Wells Construction Company?

ANSWER TO INTERROGATORY No. VII.

Defendants, nor either of them, never became interested in Wells Construction Company.

INTERROGATORY No. VIII.

Is it not true that the defendant Peter Sandberg compelled the other stockholders of the Wells Construction Company to assign their stock and turn the same over to his attorneys, for his use?

ANSWER TO INTERROGATORY No. VIII.

No. [142]

INTERROGATORY No. IX.

Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

ANSWER TO INTERROGATORY No. IX.

No, the stock was turned over to Newton H. Peer and Charles T. Peterson under the following agreement:

In the latter part of November, 1910, defendant, Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg, would finance the company and enable it to complete the contracts he would be thereby able to save himself

any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an [143] investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholder should direct. That in accordance therewith defendant Peter Sandberg immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as trustees

to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

INTERROGATORY No. X.

Is it not true that the defendant Peter Sandberg entered into an agreement to carry out certain work or contracts of the Wells Construction Company in British Columbia?

ANSWER TO INTERROGATORY No. X.

No.

INTERROGATORY No. XI.

Please state just what the agreement was, and attach a copy of the same to your answer.

ANSWER TO INTERROGATORY No. XI.

The agreement and circumstances regarding the turning over of the stock is fully set forth and stated in answer to Interrogatory No. IX, and was made orally.

INTERROGATORY No. XII.

Did you carry out your part of the agreement? [144]

ANSWER TO INTERROGATORY No. XII.

The answer to Interrogatory No. XI covers this.

INTERROGATORY No. XIII.

At whose request did you execute the notes mentioned in your answer, and the note sued upon in this case?

ANSWER TO INTERROGATORY No. XIII.

At the request of Simon Mettler and Joe Wells.

INTERROGATORY No. XIV.

Where were you when the notes were signed, and

where was the guaranty agreement executed that you mentioned in your answer.

ANSWER TO INTERROGATORY No. XIV.

As near as I remember the notes were signed here at Tacoma, and the guaranty agreement was signed at the Molson Bank in Vancouver, B. C.

INTERROGATORY No. XV.

The men signing the written guaranty agreement mentioned in your answer were members of the Wells Construction Company, were they not?

ANSWER TO INTERROGATORY No. XV.

So far as I know they were, excepting myself, I was not.

INTERROGATORY No. XVI.

Why did you execute this guaranty agreement, which made you liable for more than $55,000?

ANSWER TO INTERROGATORY No. XVI.

I executed it for the accommodation of the Wells Construction Company, a corporation, and particularly for Simon Mettler.

INTERROGATORY No. XVII.

How much did you owe the Wells Construction Company at the time you signed this guaranty, or at the time you signed any of [145] the notes you mention?

ANSWER TO INTERROGATORY No. XVII.

I did not owe it anything.

INTERROGATORY No. XVIII.

Do you, Peter Sandberg, defendant, deny personal liability on the note sued upon, and for the amount alleged? If you say that you do deny liability, state the reasons why.

ANSWER TO INTERROGATORY No. XVIII.

No, because I signed the note.

BATES, PEER & PETERSON,
Attorneys for Defendants.

State of Washington,
County of Pierce,—ss.

Peter Sandberg, being first duly sworn, on oath deposes and says: That he has read the foregoing answers, and the same are true, as he verily believes.

PETER SANDBERG.

Subscribed and sworn to before me this 26th day of May, A. D. 1914.

CHARLES T. PETERSON,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Whereupon plaintiff rested its case.

Thereupon the defendant Mathilda Sandberg, on her own part, moved for a judgment of nonsuit and dismissal of the plaintiff's action as to her and the defendants Peter Sandberg and Mathilda Sandberg, as a community, moved the Court for a judgment of nonsuit and dismissal as to the community represented by them.

Both of these motions were overruled, the Court saying: "I think it would be better to overrule the motion temporarily at this time until the case is finally completed and hear the [146] argument all together."

Testimony of Matilda Sandberg, in Her Own Behalf.

Thereupon MATILDA SANDBERG, one of the defendants, testified as a witness in her own behalf and in behalf of the defendants to the following effect: That she was the wife of Peter Sandberg; That said defendant and Peter Sandberg were married November 30th, 1894; that at the time of their marriage defendant, Peter Sandberg, owned two lots in the city of Tacoma, worth about six hundred ($600) dollars; that all of the property set forth in paragraph II of her answer, filed in this case, was acquired by her and her husband during the existence of their marriage, by their joint efforts; that said two lots, owned by Sandberg at the time of their marriage were afterwards sold and went into the community; that the list of real property set forth in paragraph II of the answer of Matilda Sandberg, and including the property where the Kentucky Building stands and the property where the Davis-Smith Building stands, was all community property; that Peter Sandberg and herself had been living together as husband and wife up to the time of trial and were then; that she knew nothing about Peter Sandberg indemnifying the American Surety Company of New York against any loss because of the American Surety Company going on the bond in the sum of twenty-five thousand ($25,000) dollars for Wells Construction Company, and that she did not have anything to do with it or participate in it in

(Testimony of Matilda Sandberg.)

any way at all, and that she only heard of the transaction lately and after the lawsuit had commenced.

On cross-examination this witness testified that she was sure that none of the property which had been described in her answer was ever the property of Peter Sandberg before they were married and that she was sure he did not have any other property, and during all of the time that they had lived together [147] Mr. Sandberg was looking after all of the property interests and was looking after all of the business and that she always trusted her husband and did not take any part in that and that whatever had been made and whatever had been done had been done by Mr. Sandberg and she went along with him as his dutiful wife.

Subsequently this witness was recalled and testified that she never owned any stock in the Wells Construction Company nor was never interested in any way, and when she was asked whether she understood about her husband looking after all of their business and she answered that she had trusted him she understood it to be that the husband was looking after all of her business; that it was not contended that Mrs. Sandberg did not know that the Kentucky Building was being erected.

Thereupon the following proceedings took place:

"Q. Mr. Peterson has asked you whether or not you had any stock and you said no, and I am asking you whatever Mr. Sandberg did with the Wells Construction Company was agreeable to you, wasn't it?

(Testimony of Matilda Sandberg.)

Mr. PETERSON.—I want to object to that because that is entirely collateral. There may have been other matters and other things to which this matter has no connection with this transaction, which is a different proposition, or Mr. Sandberg may have had other dealings. The fact is that he did not, but it is not proper cross-examination.

Objection overruled. Exception allowed.

(Last question read by the reporter.)

Mr. PETERSON.—The witness must first have knowledge and then she must acquiesce and consent in the matter in order for her to be estopped. That is the only purpose of an interrogation of this kind. Otherwise it is immaterial.

Mr. BRISTOL.—Are you going to contend that Mrs. Sandberg did not know this building was being erected?

Mr. PETERSON.—No, sir. [148]

The COURT.—Objection overruled. Answer the question.

(Question read again by the reporter.)

A. Well, he did not have anything to do with it I understood.

Q. You heard Mr. Wells' testimony when he was on the stand? You were in the courtroom?

A. Yes, sir.

Q. If Mr. Wells told the truth, and let us assume that he did, I do not know anything about it except that he swore to, were those transactions which Mr. Sandberg had with the Wells Construction Company with your knowledge and consent?

(Testimony of Matilda Sandberg.)

A. I do not know anything about it.

Q. Was whatever Mr. Sandberg did in connection with that building agreeable to you?

Mr. PETERSON.—I want to object to that as not proper cross-examination. That is merely speculation and conclusion for this witness to say that at this time.

Objection overruled. Exception allowed.

Mr. PETERSON.—I want permission of the Court to ask this witness a question in that connection.

The COURT.—Proceed.

Mr. PETERSON.—Q. Mrs. Sandberg, did you know about the dealings and transactions of Mr. Sandberg with the Wells Construction Company regarding this building and regarding other matters?

A. No, sir.

Mr. BRISTOL.—I asked him if he contended that Mrs. Sandberg did not know that Mr. Sandberg was putting up this building. Now, he turns around and tries to stultify Mrs. Sandberg by asking this question. I assume, as a member of long standing at this and other bars that that way of trying a case would be disrespectful to your Honor, and I object to that and move to have these proceedings stricken out.

The COURT.—Motion denied and the objection overruled. The question not only involves what Mr. Sandberg had to do with the Wells Construction Company with reference to the construction of the building, but also about the giving of this bond. For Mr. Peterson to say that she did not know that the

(Testimony of Matilda Sandberg.)

building was being constructed would not carry any—(Interrupted).

Mr. BRISTOL.—We are talking about the building in this connection. **[149]**

The COURT.—You said whatever he had to do with the Wells Construction Company.

Mr. BRISTOL.—You have ruled upon that and he has constantly interrupted. I submit that we have got to this issue as to whether or not a married woman can be put upon the stand and deny knowledge of her husband's acts, and if that is going to be the issue here I am willing to meet it.

The COURT.—There is nothing before the Court at this time as I recall.

Mr. BRISTOL.—Then I will repeat my question.

Q. Mrs. Sandberg, did you know that your husband—(Interrupted).

Mr. BATES.—Let me call your attention to the fact that there is a question—(Interrupted).

Question read by the reporter as follows: 'Mrs. Sandberg, did you know about the dealings and transactions of Mr. Sandberg with the Wells Construction Company regarding this building and regarding other matters?'

The COURT.—I have sustained your objection to the question because there are two questions in one.

Mr. BRISTOL.—That is not my objection.

The COURT.—This is for the aid of the Court, no matter whether she answered yes or no I would still be in doubt as to what she meant.

(Testimony of Matilda Sandberg.)

Mr. PETERSON.—Well, then, I will ask permission to ask another question.

Q. Mrs. Sandberg, did you know about Mr. Sandberg's dealings with the Wells Construction Company with reference to this undertaking and agreement with the American Surety Company?

Mr. BRISTOL.—I object to that as immaterial whether she knew it or not.

The COURT.—That is one of the final issues in the case. The objection will be overruled.

Exception allowed.

A. No, sir.

Mr. BRISTOL.—Q. Did you know that Mr. Sandberg was putting up this building?

A. Well, he put up many buildings. Which do you mean?

Q. The Kentucky Building? A. Yes, sir.

Q. When did the construction of that building commence? [150]

A. I have not kept any books, so I do not know.

Q. What is your best recollection when it commenced?

A. Well, I really could not answer you.

Q. Mr. Wells testified that it commenced in the fall of 1909. Do you remember whether that is so or not?

A. No, sir; I do not.

Q. Mr. Wells stated that the excavation of that building was finished in January, 1910. Do you remember whether that is so or not? A. No, sir.

Q. Did you ever see that building in the course of construction? A. Yes, sir.

(Testimony of Matilda Sandberg.)

Q. When. A. Well, I do not remember.

Q. Was it during 1910? A. I could not say.

Q. Did you go there at any time with your husband? A. Yes, sir.

Q. How often did you go to the building with your husband during the course of its construction?

A. I do not know; I could not answer that.

Q. Well, was it more than once, twice or three times, or frequently? A. I could not answer.

Q. How many times do you think it was?

A. Maybe two or three times; I do not know.

Q. How often did you go to the building, directing your attention to the summer of 1910, between the months of May and September before all the little odds and ends had been finished up and the building had been turned over completely, just before that how often do you think you had gone there with your husband?

A. I could not say. I do not believe I was down there once.

Q. You do not think you went there once? **[151]**

A. No, sir.

Q. You do not think you went to the building at all? A. No, I do not think I did.

Q. You do not think you went to the building at all? A. No, sir.

Q. And you never saw the building while it was being constructed? A. Yes, sir.

Q. And you knew your husband was putting it up?

A. Yes, sir.

(Testimony of Matilda Sandberg.)

Q. And you knew the Wells Construction Company was doing the work for him?

A. I could not answer that, because I do not know.

Q. You saw Mr. Wells before that?

A. Yes, sir.

Q. You knew he was doing that work?

A. I seen him working there.

Q. That was one of the pieces of property you and your husband acquired after you were married?

The COURT.—She has already answered that.

A. Yes, sir.

Q. And you knew it cost money to put up that building there? A. Yes, sir.

Q. You naturally knew that your husband would have to make payments on that building contract?

Mr. PETERSON.—I object to that on the ground that it is not proper cross-examination and argumentative.

The COURT.—Objection sustained.

Mr. BRISTOL.—Of course, I have not under the rules of this court any right to assume anything and so I am not assuming, but I am assuming to your Honor as a matter of courtesy that when a witness is turned over for cross-examination, under the circumstances that this record denotes, that counsel's argument during a testy situation concerning an issue which your Honor pronounced the main issue in the case, that I now remind your Honor respectfully of the rule; that I have an unwilling witness; [152] that I should be allowed that judicial width of examination which I am entitled to.

(Testimony of Matilda Sandberg.)

The COURT.—But to assume that there is any question about the witness knowing of the building of an eight story building; that a man would not pay money for it when he got it built, and had to pay for it, did not seem to me like proper cross-examination.

Mr. BRISTOL.—Q. Do I understand that you claim you did not know anything about the putting up of this building?

Mr. PETERSON.—I submit that that has been answered.

Objection overruled.

Mr. BRISTOL.—Q. Do I understand you to state here that you did not know your hsuband, Peter Sandberg, was putting up this building?

A. Yes, he was putting up the building so far as I know.

Q. In the course of his entire business career in Tacoma, and while you have been married to him, has he told you item by item and in each case all of the transactions he has had?

Mr. PETERSON.—I object to that as not proper cross-examination. I called this witness for two questions.

Objection overruled. Exception allowed.

Mr. PETERSON.—I think counsel should make the witness his own witness in this matter so we can cross-examine.

Objection overruled. Exception allowed.

(Question read.)

A. No, sir.

Q. So there have been many of his business trans-

(Testimony of Matilda Sandberg.)

actions, including those with the Wells Construction Company that you did not know anything about?

A. No, sir, I do not know anything about them.

Q. Might I ask you if one of those transactions—now, I want to say to the Court and to you, Mrs. Sandberg, that Mr. Peterson has forced me to submit this matter to you, and I would not do it if it had not been for Mr. Peterson's attitude toward me. I show you Exhibit No. 8 in which you as a defendant, Peter Sandberg and Matilda Sandberg together, in the Superior Court of the State of Washington, make answers to certain interrogatories, and you were asked in those interrogatories, 'Did the Wells Construction Company do any work for you or either of you at any time before the execution of the note sued on in this case? Answer, Yes.' Now, if it can be possibly true that you have no knowledge about this Wells Construction [153] Company business, how could you say 'Yes' to that interrogatory? Now, look at the paper and think it over yourself.

Mr. PETERSON.—Did she verify any of those interrogatories?

Mr. BRISTOL.—I do not care whether she verified it or not. You put your name to them.

The COURT.—If you are going to be so positive with one another, stand further away from the witness.

The COURT.—(Addressing the witness.) Do you understand the question, or have you any explanation to make of your answer.

(Testimony of Matilda Sandberg.)

A. I do not know what answer to make; I cannot understand this at all.

Mr. BRISTOL.—Q. You said in that particular interrogatory when they asked you if the Wells Construction Company was doing any work for you, you answered yes, did you not?

A. Yes, sir.

Q. Now, when they got along a little further, looking at this interrogatory, the second interrogatory this time, where Messrs. Bates, Peer & Peterson in this case for the defendants, and Mr. Sandberg, your husband, swears to it, 'Peter Sandberg, being first duly sworn, on oath deposes and says that he has read the foregoing answers and the same are true as he verily believes.' That second interrogatory was, 'If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done and the contract price therefor', and I call your attention to that to which this answer is made: 'The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was thirty-three thousand ($33,000) dollars. That during the construction of said building an additional story was added thereto as an extra, at

(Testimony of Matilda Sandberg.)

the agreed price of thirty-five hundred ($3500) dollars. That there were certain other extras consisting of digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in the store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to $1379, making the total contract price for said building, including extras $37,879.' Now, in view of that interrogatory and that statement, please explain to me how you can say you do not know anything about your husband's dealings with the Wells Construction Company?

Mr. BATES.—I object to that as incompetent, irrelevant and immaterial and not proper cross-examination, because the paper which the witness is interrogated from shows on its face that they were answers made by Peter Sandberg and not by this witness. [154]

The COURT.—That might be true and yet the question would be preliminary and leading up to how much she knew of those answers. The objection will be overruled.

Exception allowed.

Mr. BRISTOL.—On this very paper prepared by Bates, Peer & Peterson, they say, 'Come now defendants, and answering interrogatories propounded by the plaintiff herein say,' and the husband signed this paper and swore to it, and certainly if they were defendants and she let him do it—

(Interrupted.)

(Testimony of Matilda Sandberg.)

The COURT.—You remember I said in the beginning that pleadings and admissions do not have any great weight with the Court.

Mr. BRISTOL.—I have recollection of the Court's admonition, but I may be pardoned by asserting as a proposition of law that those rules are fixed.

The COURT.—Some of the Courts of the country hold that they are not admissible in evidence at all.

Mr. BRISTOL.—As pleadings in the case, but this happens to be interrogatories in a case in which these very matters are at issue, the question of knowledge of these parties, and it appears in that matter (indicating) and others.

Q. I want to know whether in view of that statement now, and your mind refreshed, you still adhere to the statement that you had no knowledge of what the Wells Construction Company was doing?

A. No, sir, I do not know anything about it.

Q. You do not know anything about it?

A. No, sir.

Q. That is your answer notwithstanding the paper which you hold in your hand? A. Yes, sir.

Mr. BRISTOL.—The paper referred to being Plaintiff's Exhibit No. 8.

Redirect Examination.

(By Mr. BATES.)

Q. Mrs. Sandberg, I suppose of course, you knew this eight story building was being built by Mr. Sandberg? A. Yes, sir.

Q. You knew that it was completed?

(Testimony of Matilda Sandberg.)

A. Yes, sir. [155]

Q. Did you know anything about the terms and conditions of the contract under which it was constructed? A. No, sir, I did not.

Q. These questions that have been referred to, did you ever make any answer to those questions yourself? A. No, sir.

Q. Did you ever see them or hear of them before?

A. No, sir.

Q. Know nothing about them whatever?

A. No, sir.

Mr. BATES.—I am referring, if your Honor please, to the questions and answers in Plaintiff's Exhibit No. 8.

Mr. BRISTOL.—Q. Do you know whether Messrs. Bates, Peer & Peterson were your husband's attorneys? A. Yes, sir.

Q. Are Messrs. Bates, Peer & Peterson your attorneys? A. Yes, sir.

(Witness excused.)"

Testimony of Joseph Wells, for Defendants.

JOSEPH WELLS was offered as a witness on behalf of the defendants and among other things testified that he was the original incorporator of Wells Construction Company and had the contract for the *Power* River Paper Company, Ltd., upon which the American Surety Company of New York, was surety and that that was the contract out of which the paper, Plaintiff's Exhibit No. 2, arose, and that he was vice president for a time and secretary for a time and then held both offices combined;

(Testimony of Joseph Wells.)

I have made a search for the stock-books and corporate books of the Wells Construction Co. in the usual places where those books were kept and where they might be found—looked high and low in Vancouver and in Tacoma in places where they should be found, and I have been unable to find them. I made this search at the request of Mr. Peterson. **[156]** Part of the books were in Tacoma and part of them in Vancouver, B. C. At one time I was considering getting a man in Vancouver, B. C. to take part of the stock, and my recollection is, I took the stock-books up there. A liquidator was appointed for the company in Vancouver, and a receiver was appointed for the company in Tacoma.

That there had been a receivership of the company and that Lund & Lund were attorneys for Wells Construction Company, and Betes, Peer & Peterson were attorneys for the receiver; that Frank Allyn, of Tacoma, was receiver; that the receiver took possession of the office and took all the books, ledgers and day-books, and the rest of the belongings of the company; that he might have taken the stock-book up to Vancouver himself; that there was a manager in the office in Vancouver by the name of Cederburg and the witness did not know whether Cederburg had possession of the stock-book or not or whether Cederburg took it away; that they had some man up there to talk over the idea of taking this stock; some man by the name of Cotton, to put some money into the company; that it was not a fact that the corporate records of the Wells Construction Company were

(Testimony of Joseph Wells.)

destroyed by himself and he denied that they were destroyed by himself.

Thereupon the witness testified that at no time during the existence of the corporation was Mr. Peter Sandberg a stockholder. To this answer of the question seeking the information plaintiff objected as not the best evidence, mere hearsay and the record had not been found nor accounted for, but the Court permitted the witness to answer and plaintiff saved an exception. [157]

Thereupon the books not being produced, the plaintiff moved to strike out the testimony of the witness that Sandberg was not a stockholder on the ground that necessary diligence had not been shown for the failure to produce the books and the testimony given had not accounted for the failure to produce the books.

Thereupon the Court denied the motion saying:

"It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time."

To which action and ruling of the Court counsel for plaintiff there and then took an exception.

(Testimony of Joseph Wells.)

On cross-examination this witness testified that they had the stock-books in Vancouver in their office; that when the witness made the trip to Vancouver he had the certificate in his pocket and the stock-book was in the office in Vancouver and that the reason he had the stock certificates in his pocket when the stock-book was in Vancouver was because at that time the stock Mr. Mettler and Mr. Vergowe had was in trust with Mr. Peterson and Mr. Peer and that witness requested to have the stock so he could make the transaction; that the stock-books were not in Tacoma and that they were not in the possession of Messrs. Bates, Peer & Peterson at the time witness went to Vancouver; that the witness could not make any other or different explanation how this stock as a matter of record stood on the books of the company other than with Messrs. Bates and Peterson as trustee.

The witness then testified that Mr. Sandberg paid some of [158] Wells Construction Company accounts direct, like Tacoma Mill Work & Supply Company and the plastering and charged the same to the Wells Construction Company account; that when he made his statement October 3, 1910, he claimed $37,879, totally due for the building and allowed a credit of $1,331.40 and that the amount of $36,547.60 was the amount Peter Sandberg was debtor to the Wells Construction Company October 3, 1910; that they started the work on the building December, 1909, and they were from some time in

(Testimony of Joseph Wells.)

January the following year until well along in October of that year before the building was turned over to Mr. Sandberg; that the building is called the Kentucky Building and the one in which Mr. Sandberg did business for a long time and had his office; that although the company was in the hands of a receiver in Tacoma and in the hands of a liquidator in British Columbia, the stock-books were in British Columbia and witness had the capital stock of the company in his pocket under letter from Mr. Peterson and then came back from Vancouver and left the stock lay in his desk in Tacoma. That Mr. Sandberg did not render his statement to the Wells Construction Company until November 29, 1910.

Thereupon Mr. Peterson asked the witness Wells this question:

"Mr. PETERSON.—Q. Did you or the Wells Construction Company or anybody in its behalf ever give Mr. Sandberg anything for signing this indemnity agreement, Plaintiff's Exhibit No. 2?"

To which evidence sought to be adduced thereby the plaintiff objected on the ground that they were estopped to show whether anything was given to Sandberg or not, and it would not be material whether anything was given or not.

This objection was overruled and the Court allowed an exception, and the witness answered, "No, sir."

Thereupon the witness testified that the Wells Construction Company was engaged in the construction of a building in the city of Tacoma, in 1910,

and at the time the indemnity agreement in evidence was given, for Mr. Sandberg. And thereupon the witness was asked whether that had anything to do at all with the giving of the agreement, Exhibit No. 2, to which the plaintiff objected on the ground that it called for the opinion of the witness and that it was a question for the Court and the Court overruled the objection and allowed an exception. And thereupon the witness was asked whether there [159] was anything said about the company's business in the construction of a building in Tacoma in connection with Sandberg's going on the indemnity agreement and the same objection was again made and the Court made the same ruling and allowed the exception and the witness answered, "No, sir."

Thereupon there was introduced in evidence Defendant's Exhibit "A," which was the contract for construction of the building known as the Kentucky Building in Tacoma, by Wells Construction Company and Peter Sandberg and the witness was asked whether or not any changes were made in the structure covered by the contract and stated that there was to be an extra story put on the building at an extra cost of something like $3500.

Thereupon Defendants' Exhibit "A" was offered and received in evidence and the witness stated that Wells Construction Company did not have any other business with Mr. Sandberg in 1910 than the construction of this building, Exhibit "A" is a written contract dated January 22, 1910, between Wells Construction Company and Peter Sandberg

(Testimony of Joseph Wells.)

for the erection of a seven story reinforced concrete building, at 1128 Pacific Avenue, Tacoma, Washington, for the lump sum of $33,000, payments to be made on the 1st day of each month, upon 85% of finished work. Contract contents provides building to be completed on, or before May 1, 1910, and if not so completed, contractor to pay demurrage at the rate of $25 per day for each day thereafter until building is completed.

Thereupon witness was shown a number of checks as follows:

Date.	By Whom Drawn.	Payee.	Amount.
Jan. 22, 1910	Peter Sandberg.	Wells Construction Co.	$5,000.00
Feb. 12, 1910	" "	Joseph Wells	1,550.80
Feb. 12, 1910	" "	" "	5,000.00
Marked, To appply on construction 1128 Pac. Ave. Bldg.,			
Mar. 3, 1910	Peter Sandberg.	Wells Construction Co.	4,000.00
[160]			
Mar. 17, 1910	Peter Sandberg.	Wells Construction Co.	4,000.00
Apr. 9, 1910	" "	" " "	5,000.00
" 23, 1910	" "	Joseph Wells	2,000.00
" 25, 1910	" "	Wells Construction Co.	1,000.00
May 19, 1910	" "	" " "	5,000.00
Jun. 4, 1910	" "	" " "	1,500.00
" 18, 1910	" "	" " "	1,500.00

And checks aggregating $1,432.25, made by Peter Sandberg between April 30, 1910 and August 27, 1910, to men who furnished labor and material for Wells Construction Company for the construction of the Kentucky Building; said payments aggregating, all told, $35,604.40, of which the witness said were payments made to the Wells Construction Company on account of the construction of said building under said contract; that said building was completed in October, 1910. Said checks were re-

(Testimony of Joseph Wells.)

ceived in evidence without objection.

Thereupon defendant offered in evidence Exhibit "C," written on a letter-head of Wells Construction Co., under date of October 3, 1910, as follows:

"Tacoma, Wash., Oct. 3d, 1910.

Mr. Peter Sandberg, Dr.

To Wells Construction Co.,

Contract price as per agreement.....	$33,000.00
To extra painting exterior brick work, 1130 Pac. Ave.	125.00
Digging and concrete work in sub-basement	739.00
Enlarging Chimney, 120 Ft. at $2.00 per foot	240.00
To Labor and Material furnished in Andrews Jewelry Str.	200.00
To putting on one additional story	3,500.00
Fifteen stationery sash in halls, old building	75.00
Total	$37,879.00

[161] Cr.

By, Balance owing to Grosser for Plastering	$	777.50
By, Our portion of Sheet Metal works		190.70
By, To Bill of Cizek's, for rep. skylight in Langlow Building		17.90
By, to Credit for 16 wooden windows, @ $5.50 Pr.		98.00

(Testimony of Joseph Wells.)

By, Lumber delivered to us at
Puyallup 247.30

$1,331.40 1,331.40

Balance $36,547.60

Thereupon counsel for plaintiff objected to the admission of the statement in evidence upon the ground that it is not responsive to any issue in the case and cannot be received because in variance with Sandberg's written contract with the plaintiff, and thereupon the Court ruled:

"It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

Thereupon Mr. Peterson stated that plaintiff in its complaint alleges that Mr. Sandberg was indebted to Wells Construction Company because of the construction of this building and in satisfaction of that he executed this indemnity agreement, to which counsel for the plaintiff replied "that was of June 2d, that is why I was objecting with reference to a statement including transactions clear up to October, when the construction we are dealing with here was in June, 1910. I do not want any one misled as to my purpose."

Thereupon the Court overruled the objections to

(Testimony of Joseph Wells.)

the admission of said statement and the same was admitted and received in evidence as Defendant's Exhibit "C" and the Court allowed an exception. [162]

The witness further testified that Exhibit "C" does not contain a credit of the payments made by Mr. Sandberg on account of the building contract.

Thereupon Defendant's Exhibit "D," as follows:

"Wells Construction Company. Nov. 29th—10.

In account with Peter Sandberg.

Balance due on merchandise..$	102.95
'IOU' Joe Wells 8/2, 1910.....	30.
'IOU' Matteson	40.
Cash Joe Wells 12/28,1909..	30.
Labor Kentucky bldg. 40 dys. at $2.50 day..... .....100.	
Paid Wells Con. Co., acct. contract Ky. bldg. 35604.40	
"IOU" Barton Mch. 8th, 10..	90.
Tacoma Millwork Supply Co. bill 8th floor.....	243.49
Two doors short at Kentucky Building	100
Windows at elevator shaft short	25.
Cleaning floors third story in Ky. bldg.	300.
Breaking skylights at Langlow building	17.90
Switches for lights in Kentucky building	700.00

(Testimony of Joseph Wells.)

Wiring eighth floor, for bell push buttons	200.	
Ten fire doors, short.....	200.	
		$37783.74
As per contract let.....		36547.60
Balance still due me.....		1236.14"

—was offered in evidence. The witness testified that it was a copy of a statement received by the Wells Construction Company from Mr. Sandberg, settting forth the credits which he claimed in connection with the construction of the Kentucky building under the contract, Exhibit "A," and further testified that the different items therein, so far as the cash payments were concerned, were correct, but that he complained about some small personal accounts contained in the statement, without designating [163] them, to which offer in evidence the plaintiff objected upon the ground that it was collateral matter and could not be admitted to vary his contractual relations with plaintiff, and as not bearing upon the issue of the case because of the fact that Wells Construction Company made a statement to Mr. Sandberg of how much he owed the company in November and Mr. Sandberg issued to the company a statement of how much the company owed him in November, did not alter the status of the parties in June, 1910, which was the time he went into this with plaintiff and which is the time when he stated he was beneficially interested.

The Court overruled this objection and admitted

(Testimony of Joseph Wells.)
and received in evidence the statement marked Defandants' Exhibit "D" and allowed an exception.

The witness thereupon testified that in June, 1910, he was general manager of the company and that at that time the Wells Construction Company was in good standing, was solvent and had good credit and could get anything they wanted in the shape of loans at the bank and could carry on the construction of the Kentucky Building without the assistance of anybody on the outside; that the statement he signed on June 2, 1910, with reference to the application for a contract bond made to plaintiff American Surety Company of New York described the building which was under contract to Peter Sandberg as the Kentucky Building and that it was about ninety-five per cent completed; that the reason the building was not completed until November was because there was a lot of work to be done on the adjoining building; the building was not completed in June, but about ninety-five per cent completed.

The witness further testified, on cross-examination, that in June, 1910, the Kentucky Building was 95% completed; that in November, 1910, I was trying to get new parties to come into **[164]** the Wells Construction Company so as to get on a new financial footing, and complete the work, and carry out the contracts on hand. I took the certificates of stock of the Wells Construction Company, and went to Vancouver, B. C. The stock book of the company was in our office there. The certificates of stock, which I took with me on that trip, was the stock

(Testimony of Joseph Wells.)

that Mr. Mettler and Mr. Vergow had placed in trust with Mr. Peterson and Mr. Peer, and I requested to have it so that I could complete the transaction of financing the company.

Mr. Peterson, Mr. Sandberg and Mr. Rydstrom went with me to Vancouver. I had two certificates at that time for 124 shares each and two for one share each; that the stock-books and records of the company had never been in the hands of Mr. Sandberg or Bates, Peer & Peterson, his attorneys. All the checks which Mr. Peterson introduced in evidence were payments made to the Wells Construction Company, by Mr. Sandberg, for work done by the Wells Construction Company on the Kentucky Building. The several checks made to other parties were made at the request of the Wells Construction Company to men who performed labor for it under the contract on the Kentucky Building, and for material which went into the building under the contract. We asked Mr. Sandberg to make these payments, and charge the same to our account. Some of these checks went thru the Fidelity Trust Company Bank and some went thru the Pacific National Bank, but the Wells Construction Company had accounts at both banks.

The Kentucky Building is the one in which Mr. Sandberg had his office, and did business for a long time. I did not return the capital stock of the Wells Construction Company to Mr. Peterson. It has been in my possession ever since, in my desk at home.

The Wells Construction Company and Mr. Sand-

berg had some **[165]** controversy over the settlement of the account for the construction of the Kentucky Building, and the statement rendered by the Wells Construction Company to him, and the statement rendered by Mr. Sandberg to the Wells Construction Company arose out of that controversy.

Testimony of Simon Mettler, for Defendants.

SIMON METTLER was thereupon called as a witness on behalf of the defendants and among other things testified that during the year 1910, the Wells Construction Company was engaged in the construction of a building for Peter Sandberg known as the eight-story building called the Kentucky Building in Tacoma; that he was an officer of the corporation along in the fall of 1910, in September and October. The witness was then asked the following questions and testified as follows:

"Q. What is your recollection as to the amount that had been paid at that time when you had that conversation with Mr. Sandberg?

A. Why, I had asked him for five thousand dollars. We were pressed for money and he says, 'Why, you have not got that much coming,' and I says, 'Well, I am not positive,' because I was negligent in looking after the books, and Mr. Lund kept the books for us, and I says to Mr. Sandberg, 'What in your opinion have you paid,' and he says, 'I think I have paid you in the neighborhood of thirty-two thousand dollars,' and that was practically to my recollection all except the extra that was to be paid, that is the extra for the top story.

(Testimony of Simon Mettler.)

Q. You did not have the books at that time?

A. No, sir.

Q. Or Mr. Sandberg either? A. No, sir."

The witness then testified that he was one of the incorporators of the company and that it succeeded to the business of the Tacoma Bridge Company in the early spring of 1910. Thereupon the witness was asked this question:

"Q. You are representing the company,—I will ask you **[166]** if you represented the company in connection with seeing Mr. Sandberg about getting him to sign this indemnity to the American Surety Company on which this suit is based?

A. What is the question?

Q. I will ask you whether or not you were representing the Wells Construction Company in obtaining Mr. Sandberg's signature to this indemnity contract, Plaintiff's Exhibit No. 2, which is the indemnity agreement given to the Surety Company in connection with the Powell River Contract?

A. Yes, I asked Mr. Sandberg in behalf of our company.

Q. Was there anything said about the relations or business of the Wells Construction Company with Mr. Sandberg in building this building in connection with this matter?

Mr. BRISTOL.—I object to that upon the ground that whether or not there was would be immaterial, and if there was it could not be received in evidence because it would be violating a written contract, and

there being no person present at this conversation representing the American Surety Company, it would not be binding.

The COURT.—That might be true as far as Mr. Sandberg is concerned, but there remains a question of whether it would be as regarding the wife and communtiy. The objection will be overruled. Exception allowed."

And thereupon the witness was permitted to answer the question over the plaintiff's objection and did answer, "No, sir." Thereupon the following question was asked the witness:

"Q. Did Mr. Sandberg receive anything from you or the Wells Construction Company for signing this agreement?

Mr. BRISTOL.—I object to that upon the ground that it is entirely immaterial, and in order to get the matter before your Honor in this connection, that the estoppel was overlooked by your Honor in my last objection, and I do not wish your Honor to overlook it here. If you will consider it, that whether there was anything paid or received by Mr. Sandberg or not is immaterial; this contract with us shows that he is beneficially interested and is estopped. We have executed this contract upon the basis of that statement of his, and the wife is estopped and he is estopped, by well considered cases in the Supreme Court of the State of Washington.

The COURT.—The main point which will have to be [167] decided in the case is whether the wife is estopped.

(Testimony of Simon Mettler.)

Mr. BRISTOL.—As a matter of law my objection is this: That when the husband acts as Mr. Sandberg acted, she cannot come back and offer this evidence out of Mr. Mettler's mouth or that of anyone else merely to clear the community.

Objection overruled. Exception allowed.

Mr. BRISTOL.—May I have my objection to all of this so as not to interrupt?

The COURT.—Yes, it will be considered as going in over your objection.

(Question read.)

A. No, sir.

Q. Did Mrs. Sandberg receive anything?

A. No, sir.

Q. From you or the Wells Construction Company for the execution of this agreement?

A. None whatever.

Q. Did Mr. Sandberg have any concern or any interest in this contract with the Powell River Paper Company? A. Absolutely none.

Q. Mr. Mettler, during the month of June, 1910, and immediately before and after that date, what was the financial condition of the Wells Construction Company?

Mr. BRISTOL.—That is the same matter I objected to this morning and I make the same objection now.

Objection overruled. Exception allowed.

A. The financial situation was in good shape then at that time."

Thereupon the witness testified that the financial

(Testimony of Simon Mettler.)
condition of the Wells Construction Company was good, that it could have completed the Kentucky Building without assistance from anybody and that it was not necessary that Sandberg sign the agreement, Plaintiff's Exhibit No. 2, to enable the Wells Construction Company to carry out the contract of the Kentucky Building. Thereupon the following question was asked the witness: **[168]**

"Q. Who were the stockholders of the corporation during that time?

Mr. BRISTOL.—I object to that as not the best evidence, the corporate records not having been produced or accounted for.

The COURT.—Well, it is accounted for so far as the other witness, but this witness, being an officer of the company might be able to tell more about it.

Mr. PETERSON.—Q. Do you know where the books and records of the Wells Construction Company are? A. No, sir.

Q. Have you known since the company became insolvent in 1910?

A. I have never had the slightest idea.

Q. Supposing you were requested now to say if you could produce them, would you have any idea where to go to get them?

A. No, sir, absolutely none.

Q. Do you know who the stockholders of the corporation were during its existence?

A. Yes, from my recollection there was only four of us, Mr. Wells, Mr. Vergowe, myself and Mr. Lund.

Q. Were Mr. or Mrs. Sandberg or either of them

(Testimony of Simon Mettler.)

ever stockholders in that corporation?

Mr. BRISTOL.—I object to that as not the best evidence, and that it is a question which involves a matter which cannot be produced out of the mouth of this witness under any theory of this case and that it is incompetent.

The COURT.—The objection is overruled, but all that his answer would amount to in the negative would be that he did not know of his having been a stockholder at any time. It is simply asking for the negative.

A. No, sir, they never had any stock in it.

Q. Were they ever interested in any way in the corporation?

Mr. BRISTOL.—I object to that on the ground that this witness cannot be asked whether they were interested or not.

The COURT.—It amounts to whether he knows or not, that is all.

A. They had absolutely nothing to do with it.

Q. Did they ever have any dealings with it outside of the company building the building over here?

A. No, sir. **[169]**

Mr. BRISTOL.—Did they ever have any dealings with what, with the Wells Construction Company? Do I understand you to answer that Mr. Sandberg never had any dealings with the Wells Construction Company except this building over here?

A. Not previous to that.

Q. Previous to what?

A. To our building that building.

(Testimony of Simon Mettler.)

Q. Not previous to the construction of the Kentucky Building.

Mr. PETERSON.—Q. Did they ever have anything afterwards to do with it excepting the signing of this bond and the endorsement of some notes and one thing and another which Mr. Sandberg finally sued you on? A. That is all.

Q. Did you ever agree to pay or compensate or give Mr. or Mrs. Sandberg anything for Mr. Sandberg's signing of the agreement, Plaintiff's Exhibit No. 2?

Mr. BRISTOL.—I object to that upon the ground that it is absolutely immaterial whether he says that he agreed to do it or not; it would not make any difference what he agreed to do.

The COURT.—Do you contend that there is more in this question than the last one in which you asked him substantially the same thing?

Mr. PETERSON.—I asked him if there was ever any agreement to give him anything.

Objection overruled. Exception allowed.

A. None whatsoever."

On cross-examination this witness testified that he had asked Sandberg to go to Vancouver to endorse a lot of notes up there for Wells Construction Company during the summer of 1910 and before the completion of the Kentucky Building.

Thereupon the witness was asked this question:

"Q. Didn't you testify in the Molson Bank case in relation to this same matter as follows:

'Q. What are the circumstances leading up to

(Testimony of Simon Mettler.)

that? A. That he signed the notes with us? Q. Yes. A. Well, because we was pressed for money—' that is, speaking of signing the notes and doing the other things. You were **[170]** asked by Mr. Peterson, 'What are the circumstances leading up to that? A. That he signed the notes with us? Q. Yes. A. Well, because we were pressed for money, very seriously and we tried to get money from the bank—Molsons Bank in Vancouver, B. C.—and I was over there once or twice before trying to get the money, and finally the answer was I should have another strong man to back me up and then possibly we could make arrangements to get money from them. They knew my record about that time and that I was pretty strong. They knew that the company was not worth an awful lot, and they said they would probably help us out if we could get another man; so I came back and induced Mr. Sandberg to go over there, after some coaxing him and talking things to him.' Did you so testify?

A. I might have used that particular word.

Q. And the question I have read to you, is that substantially your testimony on that occasion?

A. Yes, sir."

Thereupon the witness was asked this question:

"Q. Your fiscal year runs in January, and ours runs in July. I got them mixed. Now, getting back to your knowledge that Mr. Peterson talks about as an officer of the company: I understand you to say it was not until October or late in Sep-

(Testimony of Simon Mettler.)

tember that you and Mr. Sandberg had the talk then about enabling you to get something from him on account of the building, have I got that right?

A. Yes, sir."

Thereupon the witness was asked this question:

"Q. Was your receivership in Tacoma before your liquidation in Vancouver, or which way was it?

A. I could not answer that.

Q. What is your best recollection of it?

A. Ordinarily speaking, about the last part of October,—no, I think it was in November, I threw up the sponge.

Q. Now, watch: Talking about this sponge throwing and letting everything go, isn't it a fact that previous to that Mr. Sandberg required yourself and Mr. Vergowe and your respective wives to indemnify him, to convey a lot of property to him?

A. Yes, I think there was something like that." **[171]**

Thereupon the witness was asked this question:

"Q. Now, in this complaint, and for the purpose of advising you as to your arrangement, and why I asked you about whether you were a strong man in the company or not, I will call your attention to this allegation made by Mr. Peter Sandberg, in the case in which he sued you: 'That on or about said last date above referred to, to wit, the —— day of August, A. D. 1910, the defendants, Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his

(Testimony of Simon Mettler.)

wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation, in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business, and in accordance therewith said George E. Vergowe and wife and said Joe Wells and wife and said Wells Construction Company, a corporation, executed their deeds of conveyance to the property to be conveyed by them, to wit, the following lands and premises all in Pierce County, Washington,' and so on. Now, in view of your relations with the company and with your recollection refreshed from that allegation, state what you meant when you said to Mr. Peterson that there was no consideration given to Mr. Sand-

(Testimony of Simon Mettler.)
berg for what he did in consideration of the agreebent made with him about what he did with the Wells Construction Company.

A. There was not at the time when I asked him about it.

Q. You did not mean to hold back anything? You probably had forgotten about this? A. I did.

Q. The fact is you fellows did have an arrangement with him? A. Not at that time.

Q. Well, I know, but whether you made it at the minute that he did, as a matter of fact, he demanded that the arrangement be made, and you acceded to it? A. Could you blame me?

Q. Well, doesn't he tell the real truth about it?

The COURT.—If this lawsuit has not been determined, the witness might not be free to answer. [172]

The WITNESS.—What is it you want to know?

Q. How, now, in view of you having your recollection refreshed with reference to that agreement that he alleges was made there, can you say to Mr. Peterson that there was nothing between you and Mr. Sandberg in consideration for his signing those agreements.

A. Absolutely not at the time I asked him for it.

Q. I know, but why did you give him deeds and indemnity afterwards, why did you and Mr. Vergowe and Mr. Wells give him deeds and indemnity afterwards?

A. Because I wanted to play fair with the man."

Thereupon the witness was asked this question:

(Testimony of Simon Mettler.)

"Q. Then Mr. Sandberg's statement in this complaint as to what the agreement was between you and Mr. Vergowe and Wells and himself is not correct, is that right? A. I do not know.

Q. You do not know? A. No, sir.

Q. Why did you say that in view of your former answer?

A. Because I do not know there was anything like that (indicating paper) in existence.

Q. Why did you give the deeds?

A. What did I care who got the stuff after I was broke."

Thereupon there was an argument between counsel as to the effect of the complaint by Peter Sandberg against Simon Mettler and others and colloquy between Court and counsel as to the application of the testimony, whereupon counsel for the plaintiff stated: "We are in the unfortunate position of pursuing one of two points, either we are pursuing a will-o'-the wisp, the deeds not being recorded, or else that complaint when it was filed, where Peter Sandberg says it was executed, either they are held and not recorded," whereupon the Court stated: "is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds."

I did not deed or convey any property to Mr. or Mrs. Sandberg, or either of them, or give them any-

(Testimony of Simon Mettler.)
thing to induce Mr. Sandberg to sign the indemnity agreement, or any other papers that he signed for me or the Wells Construction Company. The only papers which I did sign is the paper marked Plaintiff's Exhibit No. 9, offered thereon, and received in evidence as follows: **[173]**

Plaintiff's Exhibit 9—Agreement, November 26, 1910, Between Kentucky Liquor Co. et al. and Simon Mettler.

"THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, A Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife, parties of the first, and SIMON METTLER, party of the second part.

WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia Corporation, and the Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., a certain real property in Pierce County, Washington, described as follows, to wit:

Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and

Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26) Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North ½ of N. E. ¼ of S. W. ¼ of N. W. ¼, Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

The north thirty (30) acres of the Northwest quarter (¼) of the Northwest (¼) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest quarter (¼) of the Southwest quarter (¼) of the Northwest quarter (¼) of the same Section, Township and Range, which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

A note for the sum of Twenty-five Thousand ($25,000) Dollars, made by the Wells Construction Company to said Bank of Vancouver, dated at Vancouver, B. C.,——— 1910, due ninety days after date.

A note for Fifty-five Thousand ($55,000) Dollars,

made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C., ——— 1910, and further [174] to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand ($25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand ($27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand ($10,000) Dollars; One to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand ($3000) Dollars;

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand, Five Hundred Dollars ($79,500), besides interest;

And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Invest-

ment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent.

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, a trustee, shall apply by conversion or otherwise, as much of said property above described as may be necessary to satisfy and discharge [175] the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Ken-

tucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, The Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their president and secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

Signed, Kentucky Liquor Company, a corporation, by Peter Sandberg, its President, Attest, P. H. Lack, Secretary. Wells Construction Company, a corporation, by Charles T. Peterson, its President. Attest, Newton H. Peer, Secretary. Geo. E. Vergowe. Simon Mettler."

Thereupon the witness was asked this question:

"Q. Now, Mr. Mettler, I show you in that connection what I presume is the other agreement you refer to and ask you to look at it and identify it and say whether or not it bears your signature?

A. Yes, it does.

Q. That bears the date of the 20th of June, 1910?

A. Yes, sir.

Q. In connection with your testimony in answer

(Testimony of Simon Mettler.)

to Mr. Peterson's question yesterday as to whether or not any previous arrangement or agreement had been entered into, either you or the Wells Construction Company and Peter Sandberg, previous, do you understand me, to your going to Vancouver, and having those transactions in regard to this bond here, will you be kind enough to tell me how it came, in view of your answer that there was no such arrangement, that that agreement was executed?

Mr. PETERSON.—If the Court please, defendants object on the ground that it is really not proper cross-examination.

The COURT.—(Addressing the witness.) I take it you are of foreign birth. Were you born in this country?

A. No, sir, I am of foreign birth. [176]

The COURT.—All of these complicated involved questions constantly put the witness at a disadvantage. When you can, ask single questions and get his answer.

Mr. BRISTOL.—I bow to your Honor's suggestion, and think that the witness has shown himself very resourceful in this matter. He testified that there were no arrangements between himself and the Wells Construction Company relative to the giving of this indemnity agreement. Now, we have disclosed two agreements, and I submit these to the Court. I ask to have this last one identified and offer it in evidence as Plaintiff's Exhibit No. 10.

Mr. PETERSON.—The defendant Matilda Sandberg objects on the ground that it is incompetent,

irrelevant and immaterial and tends to prove no issue in this case.

Objection overruled. Exception allowed.

The WITNESS.—I will state, if I am allowed, why it came about that I testified that way, because I really never remembered any more that this particular agreement was in existence. That is nearly five years ago."

Thereupon Defendants' Exhibit No. 10, as follows:

Plaintiff's Exhibit No. 10—Agreement, June 20, 1910, Between Wells Construction Co. and Peter Sandberg.

"AGREEMENT.

THIS AGREEMENT made and entered into this 20th day of June, 1910, between the Wells Construction Company, a corporation, of Tacoma, Washington, and Peter Sandberg of the same place,

WITNESSETH: That whereas the Wells Construction Company has heretofore on the —— day of ————, 1910, entered into a contract with the Powell River Company of Vancouver, B. C., for the construction of a dam and canal on the Powell River, B. C., for a price approximating $175,000 and

Whereas the said Wells Construction Company has made application to the American Surety Company of New York to become surety on the bond of the said Wells Construction Company in the sum of $25,000 for the faithful performance by the said Wells Construction Company of the conditions of the said contract, and

Whereas the said American Surety Company of New York refuses [177] to become surety upon the said bond of the said Wells Construction Company without some other person signing the application with the said Wells Construction Company for the said surety company to become surety upon the said bond, and

Whereas the said Peter Sandberg of Tacoma, Washington, has agreed to sign his name with the said Wells Construction Company on the application for the said bond agreeing to indemnify the said surety company in case it should be held liable on the said bond,

Now, Therefore, in consideration of the said Peter Sandberg signing the said application with the said Wells Construction Company for the said surety company to become surety upon the said bond, the said Wells Construction Company agrees to re-pay to the said Peter Sandberg any money or moneys which he may be required to pay to the said American Surety Company of New York by reason of his signing the said application with the said Wells Construction Company for the said surety Company to become surety upon the said bond and to hold the said Peter Sandberg harmless by reason of his signing the aforesaid application.

WELLS CONSTRUCTION COMPANY.
By SIMON METTLER,
President.
By JOE WELLS,
Secretary.

(Testimony of Simon Mettler.)

We individually agree to hold said Peter Sandberg harmless by reason of signing said application for a bond above mentioned.

SIMON METTLER.
JOE WELLS."

Was over the objection of defendant, Matilda Sandberg, that it was incompetent, irrelevant and immaterial, admitted in evidence.

Thereupon the witness was asked this question:

"Mr. BRISTOL.—Q. You remember I remarked to you last night after the court adjourned that I assumed you were mistaken, and I thought you were mistaken when you testified. There was no other disposition then to get at the real facts. Now, you may make any explanation you please? [178]

A. You see, when I went broke and threw up the sponge, I went away. That was nearly five years ago, and I gave it all up. I did not care where the money went that I had accumulated. You know how a man feels. That is an awful recollection to put into my mind. You know how a fellow feels.

Q. Now, will you be kind enough, Mr. Mettler, showing you Plaintiff's Exhibit No. 10, under date of June 20, 1910, to tell me to the best of your recollection where and the circumstances under which that was executed?

Mr. PETERSON.—I submit if the Court please that the agreement speaks for itself.

Mr. BRISTOL.—I am not trying to do anything with the agreement.

Objection overruled. Exception allowed.

(Testimony of Simon Mettler.)

A. I could not recall anything except that I signed it.

Q. Do you remember where and the circumstances under which you signed it?

A. Why, not any more than this instrument shows itself.

Q. Whose office were you in, if anybody's?

A. I could not remember that.

Q. Who if anybody brought the agreement to you to sign it, or did you go and get it?

A. Oh, I presume we were all together.

Q. Who? A. Mr. Wells and myself.

Q. Who else? A. And Mr. Sandberg.

Q. And who else? A. I could not tell you.

Q. Nobody but you three?

A. I am not quite positive, but I think Mr. Lund drew this agreement.

Q. Who was Mr. Lund, please?

A. Mr. Lund was a member of our company.

Q. He was a member of the Wells Construction Company? A. Yes. [179]

Q. What office did he hold, please, if you recall?

A. I am not positive whether— (interrupted).

Q. Is this the Mr. Lund you mean (indicating)?

A. That is the gentleman.

Q. The lawyer Lund, you mean? A. Correct.

Q. He is the one who brought that agreement to you to sign?

A. Somebody must have drawn it; I think it was him.

Q. Do you recall whether it was in his office that

(Testimony of Simon Mettler.)

you signed it? A. That I could not say.

Q. Or Mr. Sandberg's office?

A. Well, it was somewhere in Tacoma I presume. It is dated here.

Q. Well, all you recall about it is what you have said? A. Yes, sir."

Thereupon the witness was asked this question:

"Q. I show you Exhibit 9 dated the 26th day of November, and ask you the same question, where and in whose presence did you sign that agreement, if you recall?

Mr. PETERSON.—Defendants object on the grounds that it is not proper cross-examination, incompetent, irrelevant and immaterial.

Objection overruled. Exception allowed.

A. Well, this is one of the things that I do not remember so clearly.

Q. Will you please look at the signatures on that paper and I will call your attention to the fact that on the last sheet where the signatures are and above yours and Mr. Sandberg's are the signatures of the officers of the Wells Construction Company at that time, Mr. Charles T. Peterson as president and Mr. Newton Peer, and I will ask you whether you signed your name at that time, if you recall now, in their presence, or whether you signed it some time later, or what the circumstances were?

A. I presume I signed it right then and there.

Q. Was Mr. Sandberg present?

A. Why, I think he was."

The circumstances leading up to the conveyance of

(Testimony of Simon Mettler.)

the property [180] referred to in the agreement, Exhibit 9, were about as follows:

The Wells Construction Company wanted to get some money from a bank at Vancouver, and got Mr. Sandberg to go with us to endorse the notes. Mr. Dewar, the manager of the bank at Vancouver, said to Mr. Sandberg, "Why don't you get some surety for putting your name on those notes." Sandberg said, "No, I would rather for you to get the security." The bank let us have $25,000, and previously loaned the company $10,000. It was understood that we were to come back and execute deeds of the Wells Construction Company to the Bank of Vancouver. We executed a couple of deeds in blank, and returned to Vancouver. In the meantime, Mr. Dewar consulted his lawyer, and when we brought the deeds to the bank, said that the bank could not take them as it was not safe for an alien to hold property in the State of Washington. Mr. Dewar suggested that the deeds be made to Mr. Sandberg individually because he said he looked to Mr. Sandberg to get the money. Mr. Sandberg says, "No, I do not want any property from those people in my name, we can put it in the name of the Kentucky Liquor Company, to protect the bank, and I think that was done.

These two written agreements, Exhibits 9 and 10, are the only agreements I ever entered into with Mr. Sandberg to obtain his signature to the Surety Company, and I never agreed with him orally, to give him anything. Mr. Sandberg was interested in the

(Testimony of Simon Mettler.)
Kentucky Liquor Company so far as I knew. The property of Wells Construction Company was not to be conveyed as security for the Molson's Bank, but was for the express purpose of protecting the Bank of Vancouver.

Testimony of H. P. Burdick, for Defendants.

Thereupon H. P. BURDICK testified that he was an attorney, practicing at Tacoma, Washington, during the years 1910 and 1911, and was the attorney for the Mettlers in the action brought by Peter Sandberg against Simon Mettler and his wife, and Carl Mettler, to enforce an oral agreement in regard to certain real property in [181] Pierce County, Washington, being the action referred to in Exhibit No. 7.

At the time the Simon Mettler bankruptcy was closed in the Federal Court, I had an agreement with Mr. Peterson, attorney for the trustee, that the case of Sandberg against Mettler should be dismissed, and the *lis pendens* discharged, and the entire matter wiped out. That agreement was carried out by the exchange of deeds. Shortly after that suit was brought, a petition in bankruptcy was filed against the Mettlers, and the suit was abandoned.

In answer to the question whether that agreement was carried out, the witness answered:

"Yes, so far as the bankruptcy case was concerned, that was finally closed up and deeds exchanged between Carl Mettler and the Molson's Bank of Vancouver, B. C., and the Bank of Vancouver, as well,

(Testimony of H. P. Burdick.)

and there was a petition in bankruptcy afterwards filed against Simon Mettler."

But the witness did not know whether formal order of dismissal had ever been entered.

Testimony of Peter Sandberg, in His Own Behalf.

Thereupon PETER SANDBERG testified in person as follows:

That he was never a stockholder in the Wells Construction Company and had no interest in it, either directly or indirectly, and did not participate in any way in the profits of the company, and thereupon the witness was asked the following questions, the following objections were made and the following rulings made by the Court and the following exceptions taken:

"Q. Did you participate in any way in any of the profits of the corporation?

Mr. BRISTOL.—Your Honor understands, I take it, that of course, under the state of the pleadings here and the points already submitted to your Honor, that this testimony raises this legal point: We are maintaining for the plaintiff, that the witness himself, the defendant, cannot be permitted [182] in view of its agreement with us to testify orally in contradiction thereto, and I understand the Court expressed himself that while he understood that point the evidence will be allowed to go in until the final argument. We are objecting to this testimony on the ground that he cannot be heard now, give any testimony against that agreement plead in the pleadings, and in our reply, which was

(Testimony of Peter Sandberg.)

part of our indemnity agreement with him, and that that estoppel runs against the defendant Matilda Sandberg as well as himself.

The COURT.—The objection will be overruled and final determination reserved until the final argument.

Exception allowed.

Mr. PETERSON.—"Mr. Sandberg, did you ever receive any property or any consideration from Simon Mettler or Joseph Wells or the Wells Construction Company or anybody—(interrupted).

A. No, sir.

Q. Just a minute—for your executing and affixing your name to Plaintiff's Exhibit 2, being an indemnity agreement with the American Surety Company?

Mr. BRISTOL.—Now, at this time I object to this testimony further on the ground that it cannot be received and is incompetent for the reason that Exhibits 9 and 10 are written documents and speak for themselves, to which this witness himself was a party, and confessedly acting in connection with the community at the time, and that he cannot be heard to state anything on this witness-stand verbally in modification of or denial or alteration thereof.

The COURT.—Same ruling. Exception allowed.

Mr. BRISTOL.—And in order not to interrupt the Court again, allow me a motion to strike out such testimony as you elicited from Mr. Sandberg previous to my objection.

(Testimony of Peter Sandberg.)

The COURT.—Motion denied; exception allowed.

A. No, sir."

Thereupon the witness was asked the following questions:

"Mr. PETERSON.—Q. Mr. Sandberg, calling your attention to the operations of the Wells Construction Company in Vancouver, I will ask you whether or not you were present at the Bank of Vancouver in British Columbia in company with Simon Mettler and others connected with the Wells Construction Company regarding the endorsement of some notes of the Wells Construction Company in the latter part of 1910?

A. In the bank of Vancouver?

Q. Yes. A. Yes. [183]

Q. Mr. Sandberg, you may state whether or not any conversation took place at the bank regarding the conveyance by the Wells Construction Company and Vergowe of certain property held by them as indemnity or collateral security?

A. Well, I went up there with Mettler. Mettler asked me to go up there and I went into the bank and he wanted to borrow some money up there, the Wells Construction Company wanted to borrow some money up there, and it was a very small bank. They said they could not loan any money; they had just started the bank, and they said they did not like to loan them any money without collateral security, so the Wells Construction Company, Mettler and Joe Wells and Vergowe said they had some property belonging to the Wells Construction Company, and

(Testimony of Peter Sandberg.)

also Joe Wells and Vergowe had property of their own, and Dewar insisted upon having some deeds to that property, and told them to have some deeds made out, and they had the deeds made out in blank, and they went up there and turned the property over to Dewar—to the Bank of Vancouver—and he had been consulting his attorney up there, and he said they did not like to hold any property in this State in their own name, so he said to me, 'You had better hold that property in your name in trust for us,' and I said I did not want to do that. He said, 'Why,' and I said, 'Why, if that property has to be conveyed, I will have to go to my wife and sign those deeds over. I do not want to do it,' I says. I says, 'put it in anybody else's name,' and so he said, 'Well, any one you know who will hold it for us is all right,' so I said, 'You can take it in the name of the Kentucky Liquor Company,' and that was understood, and their bookkeeper—Frank Latcham was the notary on these deeds, but he could not do it up there, so he brought the deeds back here and filled in the name of the Kentucky Liquor Company as trustee for the Bank of Vancouver, and it was recorded. Then later on Dewar—some objection was made to the Kentucky Liquor Company holding that property, being it was a corporation, and that they could not hold the property in trust for the bank, and I think that matter was discussed in your office and I do not remember if Dewar was there or who was there, so the property was transferred to Elmer Hayden of Hayden & Langhorne of this city for the

(Testimony of Peter Sandberg.)

bank, and then later on the bank foreclosed on the property and disposed of the property.

Q. Now, Mr. Sandberg, you may state whether or not all of this property, if you know, was conveyed to Mr. Hayden by the Kentucky Liquor Company?

A. Yes, every piece of it.

Q. I mean all of the property described in Plaintiff's Exhibit 9?

A. Every bit of property the Kentucky Liquor Company had in trust for the bank was signed over to him.

Mr. BRISTOL.—That is to Mr. Hayden as successor, as trustee?

Mr. PETERSON.—Yes.

Mr. BRISTOL.—About when was that? [184]

Mr. PETERSON.—That was about a month or two, and I think—(interrupted).

Mr. BRISTOL.—Sometime about the first of the year 1911.

Mr. PETERSON.—That is my recollection of it.

Mr. BRISTOL.—Since that time the trustee went on and foreclosed for the parties and distributed the stuff.

Mr. PETERSON.—Mr. Hayden went along and foreclosed for the bank there alone.

Q. Now, Mr. Sandberg, did you get any of that property?

Mr. BRISTOL.—I object to that on the ground that it is immaterial.

Objection overruled. Exception allowed.

A. No, sir.

(Testimony of Peter Sandberg.)

Q. Did you get any proceeds of it in that foreclosure suit? A. No, sir.

Q. Did you ever have possession of any of that property? A. No, sir.

Q. Did you ever get any profits out of it in any shape, form or manner?

Mr. BRISTOL.—I object to that.

Objection overruled. Exception allowed.

A. No, sir.

Q. Did the Kentucky Liquor Company ever get any property or proceeds out of the property?

Mr. BRISTOL.—Same objection.

The COURT.—Same ruling. Exception allowed.

A. No, sir.

Q. Who finally took all of that property under that arrangement that was made there, the deeds?

A. Elmer Hayden.

Mr. BRISTOL.—I do not know whether I am making myself clear or how sure that my point is right. I direct the Court's attention respectfully to this proposition of law: The Supreme Court of the State of Washington holds in a long line of cases that it is quite immaterial whether there are any proceeds or profits or results of any kind received by the community or by the individuals composing it, and that being a rule of property, I understand under the list of cases to be the rule of property [185] in this court, and therefore it is immaterial and incompetent whether Mr. Sandberg received any proceeds, profits or benefits of any kind.

The COURT.—I am clear upon that, but it is not

(Testimony of Peter Sandberg.)

clear that this would be the only effect of his evidence. Objection overruled; exception allowed."

At the time I married Mrs. Sandberg, I had two small cottages, worth about $1,000. There was a $600 mortgage on them. All of the property described in *Mr.* Sandberg's answer was acquired by us since we were married. I never inherited any property, nobody ever gave me any. I acquired the property at different times by purchase. I sold the two lots on I Street, and spent the money, never keeping any separate account of it.

On cross-examination this witness testified that the contract Mr. Peterson introduced in evidence designated as Defendant's Exhibit "A," speaking of the witness himself, comprehended the building and property known as the Kentucky Building in Block 1104, Lot 13, Tacoma, and was part of the community business witness and his wife had always been conducting; that Mr. Peterson and Mr. Peer became president and secretary of the Wells Construction Company about the time of the execution of the instrument, Exhibit 9, November 26, 1910, and that Mr. Newton Peer and Major Bates had been his attorneys for practically twenty-five years, and that the witness recalled that the agreement of November 26, 1910, was talked over two or three days before when he was present; that the officers of the Wells Construction Company resigned; that Mr. Peter and Mr. Peterson did not take over the contract of the Wells Construction Company for him; that he was up *on* Vancouver three or four times and that

(Testimony of Peter Sandberg.)

the last trip was the November 26th trip; that the stock of the Wells Construction Company was turned over to Peer and Peterson at the time the instrument was made and that it may have been talked over three or four days before to get themselves organized and then the stock was turned over because witness [186] remembered particularly that Mr. Lund was up in the office of the building known as the Kentucky Building at the time where the Wells Construction Company had their office; that Mr. Lund turned over his share to Joe Wells and Vergowe and Mettler turned over their stock to Peterson and Peer as trustee for the Wells Construction Company, and the witness knew it was two or three days prior to the agreement of November 26th. The witnesses attention was called to the complaint in the action of Sandberg vs. Mettler, Exhibit 7, and asked how it came about that that suit was begun. He testified, 'I will tell you how that came about from the beginning. I went up to Molson's Bank in Vancouver with Vergowe, Mettler and Wells. They wanted to borrow $55,000, on the Powell River work. They already had fifteen or twenty thousand dollars, and Mr. Campbell, the manager of the bank, said, 'We cannot give you people any more money.' Mr. Mettler said, 'I am perfectly good for it myself.' I have a list of property here, which I handed to Mr. Campbell, and said, I will sign over some deed to secure the bank, or any indebtedness I make here. . He mentioned the St. Elmo hotel on Puyallup Ave., and a few other pieces worth quite a bit of money. He

(Testimony of Peter Sandberg.)

agreed, on his return to Tacoma, to make out a deed or deeds to some of the property, as security for the sixty-five or seventy thousand dollars, so I endorsed the note. Mr. Campbell came down to Tacoma two or three weeks afterwards, and insisted on Mettler making out those deeds to the bank. He went and sold the St. Elmo hotel property and started to transfer the other property. Mr. Campbell went to Bates, Peer & Petersons' office, and insisted on filing suit against Simon Mettler and Carl Mettler to stop them getting rid of the property. He insisted on me bringing the suit. That is the way the suit was brought. Afterwards it was fixed up some way, I don't know just how. Simon Mettler never did deed this property to anybody. [187]

Testimony of George E. Vergowe, for Defendants.

GEORGE E. VERGOWE was then called as a witness, and testified that he was at the bank of Vancouver at the time the $25,000 loan was obtained by the Wells Construction Company, and the manager of the bank spoke about having the Wells Construction Company and Joe Wells and myself turn over some property as security. We had the thing arranged, and made blank deeds, and took them to the bank. The bank learned that it could not hold the property so it wanted Sandberg to take it in his name, and he did not want to take it, so it was agreed it should be turned over to the Kentucky Liquor Company, and that was done. I executed a deed to forty acres, and there was nothing said at that time regarding the conveying of the property to secure any-

(Testimony of George E. Vergowe.)

body else than the Bank of Vancouver. I knew all about the property of the Wells Construction Company. Mr. Mettler, myself and my brother-in-law owned it before *the was* organized. We deeded it to the Wells Construction Company, and it was all deeded to the Kentucky Liquor Company. On the 26th of November, 1910, we turned over our stock in the Wells Construction Company to Peer and Peterson. I don't know how it happened that the Molson's Bank appears in the agreement of November 26, 1910.

Testimony of Charles T. Peterson, for Defendants.

CHARLES T. PETERSON, attorney for the defendants, then offered himself as a witness and testified about the transactions with Mr. Hayden as successor trustee; that he had personal charge of the affairs of the bank of Vancouver in connection with the matter testified to by the previous witness and was also attorney in the bankruptcy proceedings for the Molson Bank; and thereupon witness identified paper in bankruptcy in this court numbered 885, of Simon Mettler and the same was marked and received in evidence as plaintiff's Exhibit number 11.

Thereupon the instrument signed by Peter Sandberg on the 19th day of October, 1910, was shown witness and the following questions [188] were asked and the following objections made and the following ruling of the Court given and exceptions allowed:

"Q. Mr. Peterson, was that a part of the transaction of which Plaintiff's Exhibit 9 was originally a

(Testimony of Charles T. Peterson.)

part relative to the transaction between the two banks the Bank of Vancouver concerning which transaction Mr. Bates asked you about, and the Molson's Bank, concerned with the transactions of the Wells Construction Company?

Mr. BATES.—I object to that as not proper cross-examination.

Objection sustained. Exception allowed.

Mr. BRISTOL.—Q. In connection with the transaction which Mr. Bates asked you about, concerned with the Bank of Vancouver, is it not a fact, Mr. Peterson, that the agreement or instrument in this petition, Exhibit No. 11, is a very part of the same transaction as the instrument No. 9, so far as the trusteeship is concerned?

Mr. BATES.—I object to that as not proper cross-examination.

Objection sustained. Exception allowed.

Mr. BRISTOL.—Q. You may state whether or not Mr. Peterson, the property in Defendants' Exhibit "E," marked for identification, is not to your personal knowledge the same property in the draft of the instrument from your office, Plaintiff's Exhibit No. 9? A. It appears to be.

Mr. BATES.—I object to that as not proper cross-examination.

The COURT.—Are you asking now about the contents of the identification which is not in evidence?

Mr. BRISTOL.—I am asking about the similarity of that paper which he identified before the witness, with a paper which is in evidence, in order to con-

(Testimony of Charles T. Peterson.)

nect them up in such manner, that in view of the identified exhibit being withheld, it may appear clear, the effect of the evidence in this cause.

Mr. BATES.—He is examining him about an instrument which is not in evidence.

Objection overruled.

Mr. BRISTOL.—Q. When you prepared the verification of claim for the Bank of Vancouver, you had the knowledge, did you not, of the agreement of November 26, 1910, Plaintiff's Exhibit No. 9, and of this petition which you had filed for the Molson's Bank, Plaintiff's Exhibit No. 11? A. Yes, sir.

The WITNESS.—I want to state something further in this connection. I found upon investigation, prior to the filing of any of these papers, that the Molson's Bank and Peter [189] Sandberg had no interest in the property described in Plaintiff's Exhibit No. 9, notwithstanding the instrument's recitals.

Mr. BRISTOL.—I object to that and move to have it stricken out on the ground that it is deliberate verbal evidence affecting the terms of a written instrument which purports to have verity upon its face.

Objection overruled. Motion denied. Exception allowed.

The WITNESS.—After consulting Mr. E. M. Hayden, as trustee for the Bank of Vancouver, the petition and intervention of the Bank of Vancouver was filed, setting forth the recitals contained therein to the effect that it did have and hold certain securities, describing this property."

Testimony of F. M. Harshberger, for Defendants.

Thereupon F. M. Harshberger was called as a witness upon the part of the defendants to identify certain papers which were introduced in evidence as Defendants' Exhibit "E."

Testimony of R. H. Lund, for Plaintiff (In Rebuttal).

Thereupon R. H. LUND was called in rebuttal as a witness upon the part of the plaintiff and testified that he was a lawyer, been in Tacoma over twenty-four years, knew Peter Sandberg, Joe Wells, Simon Mettler, Vergowe and the Wells Construction Company; that he was the holder of one share of stock in the Wells Construction Company and held position of secretary for a considerable period of time up until the latter part of October or early in November, 1910. Upon being asked what was the occasion of giving up his connection he testified:

"A. It was at a meeting of the stockholders of the Wells Construction Company held in the Kentucky Building on Pacific Avenue during the latter part of October or early in November, 1910. The meeting was called for the purpose of considering the financial ability of the Wells Construction Company to continue its work, its contracts in British Columbia, and in fact to give up any further attempt to continue those contracts, which resulted in the resignation of the officers, the assignment in blank of our various certificates of stock, which were at that time turned over to Mr. Sandberg, or rather to Mr. Peterson, being there as attorney for Mr. Sandberg.

(Testimony of R. H. Lund.)

Q. At that meeting? A. Yes, sir.

Q. And that severed your relationship at that time? [190] A. Yes, sir."

Thereupon the witness testified that he had had occasion to meet and confer with Joseph Wells concerning transactions of Wells Construction Company, and that Joe Wells was general manager and had charge of the work and that he had had occasion to talk to Joe Wells concerning the transactions of Wells Construction Company with Peter Sandberg during the year 1910 and that the conversation took place in the Kentucky Building and also up at his office in the Bernice Building; and thereupon the witness was asked this question:

"Q. And may I ask you please if during that conversation Joe Wells stated to you, concerning the transactions between Peter Sandberg and the Wells Construction Company, how much, if any, was owing from Peter Sandberg to the Wells Construction Company for work done by the Wells Construction Company for Peter Sandberg on the Kentucky Building, or upon the building adjoining the Kentucky Building, described here in Defendants' Exhibit 'A'?

Mr. BATES.—I object to that as entirely incompetent and irrelevant and not proper rebuttal, and for the further reason that no foundation has been laid for this question. If it can be anything at all it must be for the purpose of impeachment.

The COURT.—Objection sustained. You have had Mr. Wells on the stand.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—It is not impeachment.

The COURT.—It is nothing else; the objection will be sustained. Exception allowed.

Mr. BRISTOL.—Q. Did you ascertain in any manner yourself how much Peter Sandberg owed the Wells Construction Company for the construction of the building that the Wells Construction Company was putting up for Peter Sandberg in 1910?

A. Yes, sir.

Mr. BATES.—I object to that as incompetent, irrelevant and immaterial and not proper rebuttal.

The COURT.—Objection sustained. You can ask him if he knows.

Mr. BRISTOL.—Q. I will ask you if you know.

A. Then I will have to modify my answer.

Q. Answer what the facts are.

A. I know from statements made to me by Mr. Wells and Mr. [191] Vergowe and Mr. Mettler and up until the 12th day of February, 1910, from the accounts and books kept of that contract.

Q. Now, you may state from all of those sources of knowledge what Peter Sandberg was owing to the Wells Construction Company in 1910, on or about approximately the time you had this meeting in the Kentucky Building, there was owing from Peter Sandberg to the Wells Construction Company?

Mr. BATES.—I object to that as incompetent and purely hearsay.

The COURT.—It is not purely hearsay, but as long as it permits an answer that may involve hearsay, the objection is sustained.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—It appears from the evidence of Mr. Vergowe and Mr. Mettler and Mr. Wells, officers of this company, you have allowed statements from them to be put in here. Does your Honor hold that their statements of the accounts to one of their own coadjutors in the building is not material?

The COURT.—No, sir, I do not hold it is not material, but I do hold that before you can bring in impeaching evidence—(interrupted).

Mr. BRISTOL.—This is not impeaching testimony.

The COURT.—I have held that it was. Objection overruled. Exception allowed.

Mr. BRISTOL.—Q. What office did you hold in this company at the time? A. Secretary.

Q. And were you not also its attorney?

A. Yes, sir.

Q. You continued in that relationship until this meeting when you transferred your stock?

A. Yes, sir.

Q. Now state, if you please, whether in your capacity as secretary and attorney, you knew how much Peter Sandberg owed the Wells Construction Company on and after June, 1910, and up to the time that your relations with the company ceased?

A. I did know.

Q. Will you please state what you did know?

Mr. BATES.—Before he answers that I would like to ask him if he did not know only by what he had been told by other officers of the company.

(Testimony of R. H. Lund.)

The COURT.—You may cross-examine.

Mr. BATES.—Q. Isn't that a fact?

A. As I said before, yes, sir.

Mr. BATES.—Then I object to that on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. BRISTOL.—You allowed Joseph Wells, over my objection, in the absence of the production of the books of that accounting, to testify by word of mouth of what those books contained, as to his knowledge of them, and coupled with that, they put in their statements in this court of the amounts that were deducted from Peter Sandberg in his account with the Wells Construction Company, and then what was deducted from the Wells Construction Company account with Peter Sandberg, the other way around. Now, here is an officer of the Wells Construction Company, secretary and attorney, proved to be in that relationship up until this transfer was made, and he says that he does know, and I have asked him for the amount of that indebtedness. Do I understand your Honor to rule that he cannot answer?

The COURT.—The Court held that as a preliminary the *prima facie* showing was sufficient to let in secondary evidence. It may be that you can convince the Court that there are some suspicious circumstances surrounding the disposition, but so far as the accounts admitted were concerned, they came so nearly being accounts stated that the Court let them in because they might appear to be part of the *res gestae*. Now, Mr. Wells stated positively what

(Testimony of R. H. Lund.)

his recollection was, so I did not require that he try to tell what was on the books. So far as Mr. and Mrs. Sandberg are concerned, Mr. Wells was a witness. If you can show that Mr. or Mrs. Sandberg have made any statements or anything inconsistent with what they testified to you may be given the benefit of that. So far as Mr. Wells is concerned, he is a witness for them.

Objection sustained. Exception allowed.

Mr. BRISTOL.—It is not impeaching testimony. My purpose—(interrupted).

The COURT.—The Court is not concerned with your purpose of it, it is the legal effect of it.

Mr. BRISTOL.—In order to save my record, I will offer to show by this witness that George Vergowe, Simon Mettler, and Joe Wells, the business transactions he had with them, and from his own relations, both as secretary and attorney, and up to and including the time that he severed his relationship with them in the fore part of November, he became acquainted with and knew the amount claimed by the Wells Construction Company from Peter Sandberg, how much approximately Peter Sandberg owed the Wells Construction Company, and can state such amount, and I will ask permission to show that amount by this witness. [193]

The COURT.—Understanding that his source of information is oral statements made by Joseph Wells in the absence of the defendants, the offer is denied.

Exception allowed.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—Q. Now, can you state of your own knowledge whether or not Peter Sandberg owed the Wells Construction Company any money whatever after June, 1910, and up to the time your relations as secretary and attorney with the Wells Construction Company ceased?

A. I can state—(interrupted).

Mr. PETERSON.—We submit that can be answered yes or no.

A. What is the question?

(Question read.)

A. I can only do so from information I received as stated before.

Mr. BRISTOL.—Q. Well, that information gave you knowledge, didn't it? A. Yes, sir.

Q. I will ask you to state what your knowledge is as to the amount of that indebtedness.

Mr. BATES.—We object to that.

Objection sustained. Exception allowed."

Thereupon the witness was asked if he had any recollection of meeting Peter Sandberg in his office concerning the matter of Simon Mettler turning back notes against the Wells Construction Company and he answered that he had and said that that was at the time he testified to before the time that the stock was turned over to Mr. Sandberg and at the same meeting.

Thereupon witness identified the complaint in the case of Wells Construction Company against Joseph Wells for an accounting and the same was admitted

(Testimony of R. H. Lund.)

and received in evidence and marked Plaintiff's Exhibit No. 12.

On cross-examination this witness was examined and testified as follows:

"Q. Mr. Lund, you were the attorney for the Molson's Bank in [194] a case tried up in the Superior Court a couple of months ago?

A. In a very insignificant way, Mr. Peterson.

Q. Well, you had been up to Vancouver rustling around in connection with that matter?

A. No, sir.

Q. You testified in that case? A. Yes, sir.

Q. You did not state in that action up there, did you, that the stock was transferred to Peer & Peterson in trust for Mr. Sandberg? A. No, sir.

Q. You were interested with those gentlemen in the trial of that case?

A. I was interested with Mr. Ballinger and his firm; yes, sir.

Q. You have been practicing law here a good many years? A. Yes, sir.

Q. You knew the law applicable to community property in this state fairly well? A. Yes, sir.

Q. You know that if a man is a stockholder in a corporation that—(interrupted).

Mr. BRISTOL.—I submit that is not proper cross-examination.

Objection sustained.

Mr. PETERSON.—It is leading up to his statement as being inconsistent with these statements now. I am simply showing his qualifications.

(Testimony of R. H. Lund.)

Objection sustained. Exception allowed.

Mr. PETERSON.—Q. Why is it that in that action you did not testify that this stock was turned over by the parties interested to Mr. Peer and myself in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that upon the ground that there is no testimony of that kind submitted to the witness, and counsel's statement of such testimony does not make it so, and the record in that case is the best evidence.

Objection overruled. Exception allowed.

A. What is the question? [195]

Q. Why was it you did not testify in that case that this stock was turned over by those parties to Peer & Peterson in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that on the ground he has not testified in that case any different than he has testified in this case. He testified here before this Court that that stock was turned over to you after that meeting for Mr. Sandberg, and I do not know what he testified in the other case, and I object until I see the record.

The COURT.—Objection overruled. As I have got the witness' testimony, the testimony was that the stock was turned over to Peer & Peterson in this meeting, and then you described them further as attorneys for Peter Sandberg.

The WITNESS.—I have no recollection of testifying to that here.

Mr. BRISTOL.—He testified that it was turned over to Peter Sandberg in this court.

(Testimony of R. H. Lund.)

The COURT.—If he says that he did not say that, I will have to disregard it.

The WITNESS.—I can say as I say now, as my only remembrance of that occurrence, that the stock was turned over to Peter Sandberg, but the final delivery was made to you as attorney for Peter Sandberg.

Mr. PETERSON.—Q. That is your conclusion of the matter?

A. That is my conclusion and my best recollection of what occurred four or five years ago. I was there and you were there."

Thereupon witness identified a share of stock, Defendants' Exhibit "F," being one share of the company stock of the Wells Construction Company of the par value of one hundred ($100) dollars, issued to R. H. Lund, and assigned, November 26, 1910, by R. H. Lund to Joe Wells, which was received and offered in evidence, over the objection of the plaintiff that the same was immaterial, irrelevant and not tending to prove any fact at issue in the case.

The Court then directed that the record show that during the examination of this witness Lund, Wells and Vergowe, witnesses for the defendants, remained in the courtroom.

And the plaintiff requested of the Court findings of fact and conclusions of law; but the Court made its own findings of fact and conclusions of law as all elsewhere appear of record in this cause. [196]

Order Settling and Allowing Bill of Exceptions.

BE IT KNOWN that on this 10th day of February, 1917, within the time limited therefor by law and the order of this Court, there was presented to us, the Judge before whom this cause was tried, the foregoing bill of exceptions, and with it due proof of service thereof upon the defendants' attorneys, and application having been made to have such bill of exceptions settled, allowed and signed, and the Court now having fully considered said bill of exceptions and being satisfied of our own knowledge that the same contains a true and complete record of all the proceedings had upon the trial of said cause from the time the same was called for trial to the entry of final judgment therein, including a true transcript of all of the evidence admitted upon the trial, a full, true and correct statement of all evidence tendered to and excluded by the Court and of all the objections made to the admission of evidence and of all of the rulings of the Court thereon and the exceptions thereto, of all exceptions then and there taken upon the trial to all of the rulings of the Court, and of all other matters which occurred upon the trial of said cause, including all of the testimony of the various witnesses and the exhibits in connection therewith, and being fully advised in the premises,

THE COURT SETTLES, SIGNS AND ALLOWS said bill of exceptions and hereby makes the said several matters and things therein contained a part of the record in this cause.

Dated and settled this 10th day of February, 1917.

EDWARD E. CUSHMAN,
District Judge. [197]

Proposed Bill of Exceptions Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Sep. 16, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Bill of Exceptions as Settled and Certified. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 10, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [198]

Petition for Writ of Error.

The above-named plaintiff, American Surety Company of New York, respectfully shows and represents:

That on or about the 13th day of June, 1916, the above-entitled Court entered a judgment in this cause in favor of the defendant Mathilda Sandberg, and against this plaintiff, and adjudged that the community estate was in nowise liable for the demands of the plaintiff, in which judgment and adjudication and the proceedings here prior thereunto in this cause certain errors were by the Court committed to the prejudice of this plaintiff that in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, American Surety Company of New York prays that a writ of error may issue in this behalf out of the United States Circuit Court of Ap-

peals for the Ninth Circuit for the correction of the errors and adjudications so complained of and that a transcript of the record, proceedings and papers in this cause, together with the original exhibits duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK,

By WILLIAM C. BRISTOL,

Attorney.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [199]

Assignments of Errors Accompanying Petition for Writ of Error.

The above-named plaintiff, in connection with its petition for writ of error, makes the following assignments of errors which it avers occurred upon the trial of the cause, to wit:

First. That the Court erred in denying the motion to strike out as particularly referred to in the motion those certain parts of paragraphs I, IV, V, VI and III of the answer of both defendants made jointly in said cause, and in deciding in its opinion filed herein July 31, 1915, as if and upon the ground that no such motion was made in the cause.

Second. That the Court erred in refusing to enforce the estoppel pleaded in the reply of the plaintiff.

Third. That the Court erred in rejecting evidence of the knowledge of Mathilda Sandberg of the construction of the building and the payments therefor by her husband for the community estate, and the Court erred in that respect further in sustaining objection to the evidence of Mathilda Sandberg upon the point of her knowledge of the work being done on the Kentucky Building and of her husband paying therefor out of the community funds, and in that respect erred in sustaining the objection to the question "You naturally knew that your husband would have to make payments on that building contract?" [200]

Fourth. That the Court erred in rejecting the evidence of Mathilda Sandberg upon the admissions made in the interrogatories introduced in evidence and designated and marked Plaintiff's Exhibit "A."

Fifth. That the Court erred in its ruling as follows, to wit: "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing out that as my intimation of the effect of this evidence at this time," upon the subject of the evidence as to whether or not Sandberg was or was not a stockholder of Wells Construction Company and interested therein.

Sixth. That the Court erred, over the objection of the plaintiff, in allowing the following evidence to be inquired for and adduced, to wit: That counsel for the defendants put to the witness Wells, over the objection of the plaintiff, the following question: "Did you or the Wells Construction Company or anybody in its behalf ever give Mr. Sandberg anything for signing this indemnity agreement, Plaintiff's Exhibit No. 2?" To which the Court permitted the witness to answer, over the objection then made, and the witness answered: "No, sir."

Seventh. That the Court erred in the admission of the statement, Defendants' [201] Exhibit "C," in evidence and in making the ruling in regard thereto as follows: "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company I mean the manner in which he was in one sense interested in that company."

Eighth. The Court erred in receiving in evidence Defendants' Exhibit "D."

Ninth. That the Court erred in allowing the testimony on the following question to the witness Simon Mettler: "Was there anything said about the relations or business of the Wells Construction Company with Mr. Sandberg in building this building in connection with this matter?" and in receiving and applying the same to the relationship that the defendant Mathilda Sandberg as wife bore to the matter in issue and to the community.

Tenth. That the Court erred in allowing the evidence to be adduced and in receiving the evidence upon the following question: "Did Mr. Sandberg receive anything from you or the Wells Construction Company for signing this agreement?" propounded to the witness Simon Mettler and in ruling in the reception of said evidence that the main point which would have to be decided in the case was whether the wife Mathilda Sandberg is or was estopped and in refusing and failing to enforce the estoppel when the cause was decided.

Eleventh. That the Court erred in receiving the evidence from Simon [202] Mettler under the question: "Were Mr. or Mrs. Sandberg or either of them ever stockholders in that corporation?" and in ruling that the answer of the witness would amount only to a negative and that he did not know of their having been stockholders at any time and in permitting the witness to answer, over the objections made, "No, sir, they never had any stock in it"; and in likewise ruling upon the question to the same witness Simon Mettler "Were they ever interested in any way in the corporation?" and in ruling that that amounted to whether the witness knew or not, and that was all.

Twelfth. In the course of examination of the witness Simon Mettler on the subject of whether or not Vergowe, Mettler and Wells, in consideration of Peter Sandberg endorsing certain notes and bonds of Wells Construction Company to get credit with which to raise money to carry on its business, it was

agreed between them that they would convey by deeds property to fully secure and indemnify Peter Sandberg on account thereof, the Court erred in ruling when the following question was put to the witness Simon Mettler, referring to Sandberg: "Well, doesn't he tell the real truth about it?" The Court before the witness answered then said and ruled: "If this lawsuit has not been determined the witness might not be free to answer." And thereupon the witness was asked the following question: "Then Mr. Sandberg's statement in this complaint as to what the agreement was between you and Mr. Vergowe and Wells and himself was not correct, is that right?" and there then ensued a colloquy between Court and counsel, whereupon the Court erred in making this ruling and statement in respect of said matter: "Is it not true that if your position (referring to plaintiff's position) on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community. If you show Mr. Vergowe gave one [203] deed you could get as much advantage as though you brought in a bushel of deeds."

Thirteenth. That the Court erred in disregarding Plaintiff's Exhibits 9 and 10 and in refusing to give legal force and effect thereto in its decision of the cause.

Fourteenth. That the Court erred in allowing the witness Sandberg to answer the question: "Did you participate in any way in any of the profits of the corporation?" and in permitting the witness to be

further interrogated and answer as to whether or not he received any property or any consideration from Simon Mettler or Joseph Wells for executing and affixing his name to Plaintiff's Exhibit 2, being the indemnity agreement with the American Surety Company.

Fifteenth. That the Court erred in overruling the plaintiff's motion to strike out the testimony of said last witness Sandberg upon said point and in denying plaintiff's motion to eliminate said evidence.

Sixteenth. That the Court erred in allowing the witness Sandberg to answer and be interrogated: "Who finally took all of that property under that arrangement that was made there, the deeds?" and in ruling partially upon plaintiff's objection: "I am clear upon that" and in further ruling upon plaintiff's objection: "But it is not clear that this would be the only effect of his evidence" and in overruling plaintiff's objection and receiving said evidence. [204]

Seventeenth. That the Court erred in rejecting the evidence sought to be elicited from the witness Peterson and in sustaining the objections to the questions seeking to elicit said evidence, to wit, as to whether or not the instrument signed by Peter Sandberg on the 19th day of October, 1910, as Plaintiff's Exhibit No. 11, was a part of the transaction of which Plaintiff's Exhibit 9 was a part; and the Court further erred in refusing to receive said evidence and in sustaining objections thereto and in refusing to allow plaintiff to pursue that subject; and the Court further erred in

that particular in allowing the witness to answer and to state in relation to that matter: "I found upon investigation prior to the filing of any of these papers that the Molsons Bank and Peter Sandberg had no interest in the property described in Plaintiff's Exhibit No. 9, notwithstanding the instrument's recital," and in refusing to strike out such statement of the witness and in receiving and considering the same in evidence.

Eighteenth. That the Court erred in rejecting the evidence of R. H. Lund concerning whether or not Joe Wells had stated to him about the transactions between Peter Sandberg and Wells Construction Company how much, if any, was owing from Peter Sandberg to the Wells Construction Company, and in respect of the same matter the Court erred in refusing to allow the plaintiff to ascertain from the witness Lund how much Peter Sandberg owed Wells Construction Company for the construction of the building that the Wells Construction Company was putting up for Peter Sandberg in 1910.

Nineteenth. That the witness R. H. Lund having stated that he knew from [205] statements made to him by Mr. Wells, Mr. Vergowe and Mr. Mettler and from the accounts and books kept of the contract between Sandberg and Wells Construction Company until the 12th day of February, 1910, what Peter Sandberg was owing to the Wells Construction Company and the witness Lund was asked to state from that source of knowledge what there was owing from Peter Sandberg to Wells Construction Company and the Court refused to allow the witness to

state or answer the questions on that subject on the ground that it might involve hearsay, which action of the Court was error.

Twentieth. That the Court erred in holding that the testimony offered from the witness Lund on this subject was impeaching testimony and in refusing to receive and consider the same, for that it appeared that he was secretary and attorney of the company, had *source* and access to its books and records and had and knew of the facts in the matter from conversations with Vergowe, Mettler and Wells, and the Court erred in refusing to receive or consider his evidence or allow him to answer in regard to the subject matter of what Peter Sandberg was owing the Wells Construction Company on and after June, 1910.

Twenty-first. That the Court erred in making the following ruling in respect of said matter: "The Court held that as a preliminary the *prima facie* showing was sufficient to let in secondary evidence (having reference to the books). It may be that you can convince the Court that there are some suspicious circumstances surrounding the disposition, but so far as the accounts admitted were concerned they came so nearly being accounts stated that the Court let them in [206] because that might appear to be part of the *res gestae*. Now, Mr. Wells stated positively what his recollection was, so I did not require that he try to tell what was in the books. So far as Mr. and Mrs. Sandberg are concerned, Mr. Wells was a witness. If you can show that Mr. or Mrs. Sandberg have made any statements or anything inconsistent with what they testified to, you may be given the

benefit of that. So far as Mr. Wells is concerned, he is a witness for them."

Twenty-second. The Court erred in this same connection in making the following ruling with reference to the testimony of the witness Lund and against the offer of counsel for plaintiff to show by the evidence the facts sought to be ascertained, to wit: "Understanding that his (referring to Lund) source of information is oral statements made by Joseph Wells in the presence of the defendants, the offer is denied."

Twenty-third. The Court erred in refusing to allow the witness Lund to state what his knowledge was as to the amount of that particular indebtedness.

Twenty-fourth. That the Court erred and abused judicial discretion in the course of examination of the witness Lund in the following particulars, to wit:

"Mr. PETERSON.—Q. Why is it that in that action you did not testify that this stock was turned over by the parties interested to Mr. Peer and myself in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that upon the ground that there is no testimony of that kind submitted to the witness, and counsel's statement of such testimony does not make it so, and the record in that case is the best evidence. [207]

Objection overruled. Exception allowed.

A. What is the question?

Q. Why was it you did not testify in that case that this stock was turned over by those parties to Peer & Peterson in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that on the ground he

has not testified in that case any different than he has testified in this case. He testified here before this Court that that stock was turned over to you after that meeting for Mr. Sandberg, and I do not know what he testified in the other case, and I object until I see the record.

The COURT.—Objection overruled. As I have got the witness' testimony, the testimony was that the stock was turned over to Peer and Peterson in this meeting, and then you described them further as attorneys for Peter Sandberg.

The WITNESS.—I have no recollection of testifying to that here.

Mr. BRISTOL.—He testified that it was turned over to Peter Sandberg in this court.

The COURT.—If he says that he did not say that, I will have to disregard it.

The WITNESS.—I can say as I say now, as my only remembrance of that occurrence, that the stock was turned over to Peter Sandberg, but the final delivery was made to you as attorney for Peter Sandberg.

Mr. PETERSON.—Q. That is your conclusion of the matter?

A. That is my conclusion and my best recollection of what occurred four or five years ago. I was there and you were there."

And the Court erred in refusing to consider said evidence and in ruling as it is shown by the record that the Court did in respect of said evidence and that the action of the Court in these particulars was prejudicial to the rights of the plaintiff.

Twenty-fifth. That the Court erred in refusing the requests for findings of fact made by plaintiff and numbered 1 and numbered from 6 to [208] 12, both inclusive, and numbered 17 and numbered from 23 to 26, both inclusive, and numbered from 28 to 34, both inclusive, and 37 thereof, and in failing to make findings of fact upon said matters and in finding the facts contrary thereto.

Twenty-sixth. That the Court erred in refusing the conclusions of law requested by plaintiff numbered 1 to 3, both inclusive, and those numbered 4 to 9, both inclusive, and that one numbered 12, and in failing and refusing to conclude upon the law as therein requested.

Twenty-seventh. That the Court erred in holding and deciding as it did in its opinion and decision July 31, 1915: "Under these circumstances it is clear that the mere fact that the defendant Peter Sandberg had at the time of signing the application other contractual relations with the Wells Construction Company, would not make him other than an accommodation indemnitor and of itself would not make a debt growing out of the indemnity agreement the debt of his wife or the community."

Twenty-eighth. That the Court likewise erred in its opinion July 31, 1915, in holding and deciding: "The fact that Peter Sandberg paid direct certain material men furnishing supplies for the construction of the Kentucky Liquor Company Building under a contract with the Wells Construction Company is not unusual conduct under such circumstances. His becoming an indemnitor for the Wells

Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that thereby he would protect any community interest in the completion of the [209] Kentucky Liquor Company Building.

Twenty-ninth. That the Court's rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to wit: The said rulings for identification on this assignment being referred to as A, B and C:

A. "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time."

B. "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

C. "Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you

show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds."

Thirtieth: That the Court erred in deciding that Peter Sandberg alone was liable and that there was no liability of the community estate upon the evidence and law of this case.

Thirty-first. That the Court erred in making its finding and in finding and declaring that defendant Mathilda Sandberg had no knowledge or notice of the matters and things set forth in finding of fact IX made by said Court or of the pendency of said action referred to therein [210] and that said finding was against the evidence and against the law.

Thirty-second. That the Court erred in making its finding of fact numbered XII in so far as it therein found that neither of the defendants had any financial interest in the Wells Construction Company and that Plaintiff's Exhibit 2 was signed by Peter Sandberg for accommodation only and that there was no agreement or understanding that the defendant should receive anything and that Wells Construction Company in June, 1910, was in good and substantial condition, for that the same is against the law and against the evidence.

Thirty-third. That the Court erred in its finding of fact numbered XXII in finding that the agreements therein referred to were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife, Mathilda Sandberg, and in concluding therein "That said agreements or either of them were not for the benefit or gain or in the in-

Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that thereby he would protect any community interest in the completion of the [209] Kentucky Liquor Company Building.

Twenty-ninth. That the Court's rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to wit: The said rulings for identification on this assignment being referred to as A, B and C:

A. "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time."

B. "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

C. "Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you

show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds."

Thirtieth: That the Court erred in deciding that Peter Sandberg alone was liable and that there was no liability of the community estate upon the evidence and law of this case.

Thirty-first. That the Court erred in making its finding and in finding and declaring that defendant Mathilda Sandberg had no knowledge or notice of the matters and things set forth in finding of fact IX made by said Court or of the pendency of said action referred to therein [210] and that said finding was against the evidence and against the law.

Thirty-second. That the Court erred in making its finding of fact numbered XII in so far as it therein found that neither of the defendants had any financial interest in the Wells Construction Company and that Plaintiff's Exhibit 2 was signed by Peter Sandberg for accommodation only and that there was no agreement or understanding that the defendant should receive anything and that Wells Construction Company in June, 1910, was in good and substantial condition, for that the same is against the law and against the evidence.

Thirty-third. That the Court erred in its finding of fact numbered XXII in finding that the agreements therein referred to were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife, Mathilda Sandberg, and in concluding therein "That said agreements or either of them were not for the benefit or gain or in the in-

terest of the community consisting of the defendants or for the use, benefit or interest of the defendant Mathilda Sandberg," for it is against the law and against the evidence.

Thirty-fourth. That finding of fact XXIII made by the Court is against the evidence, inconsistent with the other findings of fact and against the law and disregards and ignores the rule of law that the husband is the manager of the community estate and the agent of the wife. [211]

Thirty-fifth. That the finding of fact XXV made by the Court is against the evidence of R. H. Lund and in disregard of said evidence and based upon the ruling of the Court excluding the evidence of said Lund and in disregard of the same, for that said stock referred to in said corporation was placed in the hands of Newton H. Peer and Charles T. Peterson as trustees for the use and benefit of Peter Sandberg.

Thirty-sixth. That the third conclusion of law made by the Court is erroneous and contrary to the law and inconsistent with the findings of fact which the Court did make and against the findings of fact requested by the plaintiff which the Court refused to make and against the evidence.

Thirty-seventh. That conclusion of law IV made by the Court is erroneous and contrary to the law and inconsistent with the findings of fact which the Court did make and against the findings of fact requested by the plaintiff which the Court refused to make and against the evidence.

Thirty-eighth. That the Court erred in entering

the judgment and order of the 13th of June, 1916, for that it is against the law, against the evidence, and contrary to the evidence; that in entering the judgment of the 13th of June, 1916, the Court erred in limiting the right of recovery to plaintiff to Peter Sandberg alone and denying any right of recovery against the community property.

WHEREFORE, the above-named plaintiff in error prays that the aforesaid judgment of the above-entitled Court in this cause entered [212] June 13, 1916, be reversed so far as it limits recovery of plaintiff to Peter Sandberg alone and that it be adjudged and decided that plaintiff have the right to recover against the community estate.

WILLIAM C. BRISTOL,
Attorney for Plaintiff in Error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [213]

Order Allowing Writ of Error and Fixing Amount of Bond.

This cause being further heard on the petition of the plaintiff for allowance of a writ of error, and there being filed therewith an assignment of errors to be urged by plaintiff, praying also that a transcript of the record and proceedings and papers in this case and the original exhibits duly authenticated upon which the judgment and adjudication in this cause were rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and

that such other and further proceedings may be had therein as proper in the premises, it is by the Court here now

CONSIDERED, ORDERED AND ADJUDGED that a writ of error as prayed for by the plaintiff be and the same is hereby allowed, and the plaintiff being a surety company authorized to do business in Washington may file its bond herein in the full and just sum of five hundred dollars ($500) as security for all damages and costs that the defendants above-named may sustain in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 11th day of Dec., 1916.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[214]**

Bond on Writ of Error.

United States of America,
District and State of Washington,—ss.

KNOW ALL MEN BY THESE PRESENTS, that American Surety Company of New York, the plaintiff above named and authorized to do a surety business of and in this district and the State of Washington, does hereby bind and hold itself to pay unto the defendants Peter Sandberg and Mathilda Sandberg the full and just sum of five hundred dollars ($500), to be paid to the said defendants, his

or their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, American Surety Company of New York binds itself, its successors and assigns jointly and severally by these presents.

Sealed and executed this 11th day of December, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, the above-entitled cause was lately heard and determined in the above-entitled court and a judgment was rendered against American Surety Company of New York and in favor of Mathilda Sandberg and the community estate of Peter Sandberg and Mathilda Sandberg, and the plaintiff having petitioned for and obtained the allowance of a writ of error and filed a copy thereof in the clerk's office to reserve said judgment in said cause and the citation having been issued and directed to the defendants admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city and county of San Francisco within thirty (30) days therefrom.

Now, the condition of the above obligation is such that if the said American Surety Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its said writ of error good, then the above obligation to be [215]

void, otherwise it is to remain in full force, virtue and effect.

AMERICAN SURETY COMPANY OF NEW YORK.

By C. MILFORD COYE,
Resident Vice-president.

By C. E. DUNKLEBERGER,
Resident Asst. Secretary.

[Corporate Seal of American Surety Company of New York.]

Sealed and delivered in the presence of:

F. E. GRIGSBY,
D. M. SAWTELLE,

Approved:

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[216]**

Stipulation to Transmit Original Exhibits to Appellate Court.

It is stipulated by and between counsel for the respective parties, in order to shorten the record herein and obviate cost of printing, that all of the original exhibits introduced by either party hereto as now in possession of the clerk of this court may and shall be, under the order of this Court, transmitted direct to the United States Circuit Court of Appeals for the Ninth Circuit with the transcript of record herein

for use by either party in the United States Circuit Court of Appeals upon the hearing of the writ of error in this cause, and that the Court here may make such order as is customary in such cases for the transmission of such original exhibits.

Dated at Tacoma, Washington, November 28, 1916.

BATES, PEER & PETERSON,
Attorneys for Defendants.

W. C. BRISTOL,
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 4, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [217]

Order Transmitting Original Exhibits as Part of the Record.

It having been stipulated by respective counsel, in order to shorten the record and obviate unnecessary printing, that the original exhibits herein may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record herein, it is by the Court here

CONSIDERED, ORDERED AND ADJUDGED that the clerk of this court in making up the proceedings may and shall transmit with the original record herein all of the original exhibits as introduced in evidence in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, at San Fran-

cisco, as part of the record herein for consideration of the Appellate Court.

Given and done in open court this 4th day of Dec., 1916.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 4, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [218]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of American Surety Company of New York, a Corporation, Plaintiff, versus Peter Sandberg and Mathilda Sandberg, his wife, Defendants, as required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office in said District at Tacoma; and that the same constitute my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error and original Citation, together with two original Orders Extending Time to File Return on Writ of

Error; and that, under separate cover, duly certified, I am transmitting herewith the original exhibits called for in Stipulation of Counsel and Order of Court for removal of same herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 589 folios at 15¢ each	$88.35
Certificate of Clerk to Transcript, 3 folios at 15¢ each	.45
Seal to said Certificate	.20
Certificate and Seal to original exhibits, 3 folios	.65

[219]

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 10th day of March, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy Clerk. [220]

Writ of Error.

The United States of America,—ss.

The President of the United States, WOODROW WILSON, to the Honorable Judge of the District Court of the United States of the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between American Surety Company, of New York, a corporation, plaintiff in error, and Peter Sandberg and Matilda Sandberg, his wife, defendants in error, a manifest error has happened to the damage of the plaintiff in error as by said complaint appears, and we being willing that error, if any hath been, should be corrected and a full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the United States Court of Appeals may cause further to be done therein to correct the error what of right, and according

to the laws and customs of the United States should be done.

Witness the Honorable EDGAR DOUGLASS WHITE, Chief Justice of the United States, this 11th day of December, A. D. 1916.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Stambak,
Deputy Clerk.

No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. American Surety Company of New York, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Citation on Writ of Error.

United States of America,
District of Washington,—ss.

To Peter Sandberg and Matilda Sandberg, His Wife, and to Bates, Peer & Peterson, Their Attorneys of Record, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Washington, wherein American Surety Com-

pany of New York, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and particularly justice should not be done to the parties in that behalf.

Given under my hand and seal at Seattle in said District, this 11th day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] EDWARD E. CUSHMAN,
Judge.

District of Washington,
County of Pierce,—ss.

Due service of the within citation on writ of error is hereby accepted in Tacoma, Pierce County, Washington, this 11th day of December, 1916, by receiving a copy thereof duly certified to as such by W. C. Bristol, attorney for plaintiff in error.

BATES, PEER & PETERSON,
Attorneys for Defendants in Error.

No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. American Surety Company of New York, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Order Extending Time to File Transcript on Writ of Error.

This cause being further heard on the application of the plaintiff in error for an extension of time to file transcript on writ of error,

IT IS, by the Court, here now CONSIDERED, ORDERED AND ADJUDGED that the time in which to file transcript on writ of error is hereby extended sixty (60) days from and after the 29th day of the time allowed by law for lodging said transcript in the Circuit Court of Appeals.

ORDERED, this 11th day of December, 1916.

EDWARD E. CUSHMAN,
District Judge.

In the United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Mathilda Sandberg, His Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Order Extending Time to and Including April 5, 1917, to File Record.

For good cause shown, it is by the Court here now CONSIDERED, ORDERED AND ADJUDGED that the time within which to file in the United States Circuit Court of Appeals for the Ninth Circuit, the

transcript or record on Writ of Error herein is hereby extended to and including the 5th day of April, A. D. 1917.

Dated this 2d day of March, A. D. 1917.

EDWARD E. CUSHMAN,
District Judge.

In the United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Mathilda Sandberg, His Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 2, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2951. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed March 14, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Plaintiff in Error,

vs.

PETER SANDBERG and MATHILDA SANDBERG, his wife,
Defendants in Error.

No. 2951

Brief of Plaintiff in Error

MESSRS. BATES, PEER & PETERSON and
MR. CHARLES F. PETERSON,
Tacoma, Washington,
Attorneys for Defendants in Error.

WILLIAM C. BRISTOL,
Portland, Oregon,
Attorney for Plaintiff in Error.

PORTLAND PRINTING HOUSE CO., PORTLAND, OREGON

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Plaintiff in Error,

vs.

PETER SANDBERG and MATHILDA SANDBERG, his wife,
Defendants in Error.

No. 2951

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

American Surety Company of New York, upon receiving the application introduced in evidence as Plaintiff's Exhibit No. 2 and as set forth in the complaint (record p. 28), made and entered into a bond, Plaintiff's Exhibit No. 3, in the sum of

twenty-five thousand dollars ($25,000) to Powell River Paper Company, Ltd.

Thereafter Wells Construction Company made default in its contract and Powell River Paper Company, Ltd., enforced the bond with the result that a judgment was taken against the American Surety Company of New York for the sum of thirty-one thousand six hundred thirty-two and 94-100 dollars ($31,632.94) to the extent of the amount of its bond in the sum of said twenty-five thousand dollars ($25,000).

In and about these proceedings there were stipulated items of costs and expenditures amounting to fifteen hundred fifty-six and 20-100 dollars ($1556.20) in defense of liabilities adjudicated against the plaintiff in error, making in all a total of twenty-six thousand five hundred fifty-six and 20-100 dollars ($26,556.20).

For the purpose of recovering these moneys from Peter Sandberg and Mathilda Sandberg, his wife, as the community, a complaint was filed in the United States District Court of the Western District of Washington, Southern Division. The particular features of the indemnity agreement or contract upon which the right of recovery was based consist of the following:—

> "VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, **any right, or remedy, or demand which the indemnitor may have for**

the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose."

* * * * *

"X. That the Surety also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the

award and performance of such contract and obtaining such suretyship."

(See record pp. 24 to 26.)

The defendants made an answer and admitted that Peter Sandberg signed and subscribed the application for the contract bond as set forth in the complaint, but both defendants took the position that the application was signed for the sole benefit, use and accommodation of Wells Construction Company and not for the use, benefit or profit of Peter Sandberg or his co-defendant, Mathilda Sandberg, or the community consisting of the defendants nor for the aid, use or benefit of any purpose in which the defendants or either of them or the community consisting of them was interested. The scope of the answer of the defendants is practically within these limits and they set forth a detailed list of the community property and allege that it would be a cloud upon the title if a judgment was rendered against Peter Sandberg individually or against the defendants jointly.

(See record p. 42.)

The complaint in this case specifically presented the following certain and definite issue:—

"Par. XI.

That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and in-

demnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.

Par. XII.

That in and by paragraph IX in said application and indemnity agreement hereinbefore referred to and in paragraph VI hereof described, it is, among other and various things, provided that the order, judgment or adjudication by reason of such suretyship shall be prima facie evidence of the fact and of the extent of the indemnitor's liability thereof to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of the said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement and that the suretyship was entered into for the special benefit of the said Peter Sandberg and the special benefit and protection of Peter

Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship and to both said clauses IX and X said Peter Sandberg agreed in addition to the other clauses in said agreement.

Par. XIII.

That the defendant, Peter Sandberg, contracted with the plaintiff in the manner aforesaid in the prosecution of the community estate, business and enterprise in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company and of contracts entered into between it and Powell River Paper Company, Limited, on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia and participation in profits derived from its operations in the Province of British Columbia and would and did further obtain the postponement of payment and discharge of indebtedness of Peter Sandberg and said community, estate and business from liability thereon to said Wells Construction Company."

The plaintiff in error made its motion early in the case to strike out this answer for the causes and reasons set forth on pages 43 to 45 of the record, and the Court granted the paragraph of

the motion which was a denial as shown in paragraph IV of the answer (p. 38 of record) that in turn was directed to paragraph XI of the complaint.

Now paragraph XI of the complaint distinctly alleged:—

> "That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and indemnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same."

(See record p. 34.)

The Court made its order that the answer as stricken might stand as the amended answer (record p. 46) and thereupon the plaintiff in error filed its reply which tendered issue upon denials as to affirmative matter and pleaded affirmatively and as new matter estoppel of the right to either or both of the defendants to deny the terms of the written agreement, Plaintiff's Exhibit No. 2.

(See record pp. 50 and 51.)

Moreover estoppel was also pleaded based upon the proposition that the contract, so far as the plaintiff in error was concerned, was executed and that the plaintiff as surety had relied upon the contract and representations of said Sandberg in his said contract when the plaintiff in error had given its bond to Wells Construction Company.

(See record p. 54.)

Furthermore estoppel was pleaded based upon specific notice upon Peter Sandberg at his family residence.

(See record pp. 57 to 63.)

(See, also, Assignments of Error, 2nd, 3rd, 9th and 10th.)

(Record pp. 258 to 260.)

At the time of trial the Court permitted Mathilda Sandberg to file a separate answer over the objection of the plaintiff in error.

(See record pp. 63 to 69.)

The case was stipulated to be tried before the Court without a jury and as the findings of fact and the opinion of the Court and its actions on the different features of the case will be discussed in the brief, it is not disposed here in the statement to make a long explanation of it. Suffice it to say that the Court granted a judgment against Peter Sandberg individually, but denied any relief against the

community and held to all purposes and effects that there was nothing in the estoppels pleaded; that because Peter Sandberg had made these agreements as the husband and agent of the community was no reason why the community should be bound and thereupon passed a judgment wherein, according to the fourth conclusion of law, it was provided:—

> "That said judgment should provide that it is a separate debt of Defendant Peter Sandberg, and not a debt, liability or obligation of Defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real property of defendants hereinabove specifically set forth."

Such a judgment was entered (record pp. 164-166.)

Within the time provided by law plaintiff sued out its writ of error and filed its assignments of errors and the cause comes to this Court to correct the judgment thus entered.

Big Facts in the Case and Court's Action Thereon

The trial court's refusal to sustain the motion of the plaintiff to strike out the answers of defendants in the particulars mentioned (record pp. 43-45) is assigned as error, record page 257.

But the trial court did strike out Par. IV of the **joint answer** of defendants, record page 38, and also Par. IV of the separate answer of Mathilda Sandberg, which the court allowed her to file on the day of the trial. (Record p. 65.)

Consequently Par. XI of the complaint of the plaintiff stood then and stands now as admitted The full importance of this situation appears when the findings of the court in this relation are examined.

The court among other findings of fact made the following:—

"XIII.

> That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants from any liability under 'Plaintiff's Exhibit 2,' and said agreement

was introduced and received in evidence herein as 'Plaintiff's Exhibit 10.'

XIV.

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars ($35,000) then due."

* * * * *

"XVI.

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

XVII.

That Peter Sandberg paid direct certain material-men furnishing supplies and laborers performing work, to-wit, Tacoma Mill Company, to-wit, one named Grosser, to-wit, one named Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit 'A' entered into with Wells Construction Company.

XVIII.

That Peter Sandberg took over the building known as the Kentucky Building under the contract Defendants' Exhibit 'A,' and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

XIX.

That the work which the Wells Construction Company was doing in June for Peter Sandberg was community work and the building described in Defendants' Exhibit 'A' was a community building and consisted of and became community property.

XX.

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler, were defendants and the same is in evidence in this cause as 'Plaintiff's Exhibit 7' and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:—

'III. That on or about said last date above referred to, to-wit, the —— day of August,

A. D. 1910, the defendants, Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business. * * *

'IV. That pursuant to said agreement so entered into, plaintiff on or about the —— day of August, 1910, went with the defendant, Simon Mettler, to the City of Vancouver, in

the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant's request, and in accordance with said agreement hereinabove referred to, endorsed certain promissory notes and a guarantee in writing to The Bank of Vancouver, of Vancouver, B. C., to the amount of Twenty-five Thousand ($25,000) Dollars, and plaintiff pursuant to said agreement so made with said defendants endorsed as a surety an indemnity bond to the American Surety Company in the sum of Ten Thousand ($10,000) Dollars, to enable said defendants and said Wells Construction Company to enter into a contract with the said City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of Twenty-five Thousand ($25,000) Dollars to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company, are yet uncompleted and plaintiff is as yet unrelieved from the liability on account of said notes, guarantee and indemnity bonds. * * *

'XII. That the liability of plaintiff on ac-

count of the bonds, notes and guarantees executed by him pursuant to said agreement with the defendants, Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the same will probably exceed Thirty Thousand ($30,000) Dollars, over and above the securities and indemnity already held by plaintiff.'

XXI.

That on the 26th day of May, 1914, in cause No. 35986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants, Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court, in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this

cause as 'Plaintiff's Exhibit No. 8' as follows, to-wit:—

'INTERROGATORY No. I.

'Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case?

'ANSWER TO INTERROGATORY No. I.

'Yes.

'INTERROGATORY No. II.

'If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

'ANSWER TO INTERROGATORY No. II.

'The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thousand ($33,000) Dollars. That during the construction of said building an additional story was added thereto as an extra,

at the agreed price of Thirty-five Hundred ($3500) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to $1379, making the total contract price for said building, including extras $37,879.00.

'INTERROGATORY No. III.

'What did you every pay the Wells Construction Company for the work done by them for you?

'ANSWER TO INTERROGATORY No. III.

'I paid the Wells Construction Company $35,794.40 in cash, and paid material-men for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of $1677.84, which I paid at the request and instance of the Wells Construction Company.

'That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around

building, at $2.50 per day.....	$100.00
Cleaning of floors in third story of the old and new building.....	300.00
2 Doors taken out in the old Kentucky Building	100.00
Breaking of Skylight in Langlow Building adjoining	17.90
Cost of installing switches for lights in Kentucky Building	700.00
Wiring floors for bell push-buttons..	200.00
10 fire doors short.....	200.00
Total,	$1,617.90

'That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. * * *

'INTERROGATORY No. VI.

'State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and the date of the completion of same.

'ANSWER TO INTERROGATORY No. VI.

'The Wells construction Company began the construction of a building for defendants in

February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. * * *' ''

"XXIV.

That during all the times herein mentioned Messrs. Bates, Peer & Peterson were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Kentucky Liquor Company, and Messrs. Peterson and Peer were on November 26, 1910, president and secretary, respectively, of Wells Construction Company."

Plaintiff filed its exceptions to the findings of fact, etc., made by the court (record pp. 158-163) and among others presented the following exception:—

"ELEVENTH EXCEPTION:

Plaintiff excepts to the finding of fact numbered IX wherein it is found that the notice of the 17th of May, 1911, was served upon Peter Sandberg 'at his place of business,' whereas the evidence shows and the notice itself in evidence with proof of service attached thereto exhibits, that upon that date there was served upon Peter Sandberg as his residence and at the residence of Mathilda Sandberg in

Tacoma, a notice as specified in said finding, which is Plaintiff's Exhibit 4, and that said finding IX is against the evidence for that Mathilda Sandberg had means of knowledge and her attorneys, Messrs. Bates, Peer & Peterson, knew of all the matters and things contained in said notice."

(See Assignment of Error, Thirty-first, Record p. 269.)

In this connection the testimony of Mrs. Sandberg (record p. 183 is very important.)

"On cross-examination this witness testified that she was sure that none of the property which had been described in her answer was ever the property of Peter Sandberg before they were married and that she was sure he did not have any other property, and during all of the time that they had lived together Mr. Sandberg was looking after all of the property interests and was looking after all of the business and that she always trusted her husband and did not take any part in that and that whatever had been made and whatever had been done had been done by Mr. Sandberg and she went along with him as his dutiful wife."

(See Assignment of Error, thirty-third, Record, p. 269.)

(See, also, Assignment of Error, Thirty-fourth, Record, p. 270.)

The contracts of indemnity that Peter Sandberg

admittedly entered into for the desired benefit of the community were as follows:—

"Plaintiff's Exhibit 9—Agreement, November 26, 1910, Between Kentucky Liquor Co. et al. and Simon Mettler.

"THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, A Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife, parties of the first, and SIMON METTLER, party of the second part.

WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia Corporation, and the Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., a certain real property in Pierce County, Washington, described as follows, to-wit:

Dia. Twelve (12), Lot Fifteen (15) Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six

(26), Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North ½ of N. E. ¼ of S. W. ¼ of N. W. ¼, Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to-wit:

The north thirty (30) acres of the Northwest quarter (¼) of the Northwest (¼) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest quarter (¼) of the Southwest quarter (¼) of the ..orthwest quarter (¼) of the same Section, Township and Range, which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to-wit:

A note for the sum of Twenty-five Thousand ($25,000) Dollars, made by the Wells Construc-

tion Company to said Bank of Vancouver, dated at Vancouver, B. C., ———— 1910, due ninety days after date.

A note for Fifty-five Thousand ($55,000) Dollars, made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C., ———— 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand ($25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand ($27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand ($10,000) Dollars; One to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand ($3000) Dollars;

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand Five Hundred Dollars ($79,500), besides interest;

And whereas said Mettler is the holder of

one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent.

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same

for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, a trustee, shall apply by conversion or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, The Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their president and secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively hereto.

IN WITNESS WHEREOF, said parties

have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

Signed, Kentucky Liquor Company, a corporation, by Peter Sandberg, its President, Attest, P. H. Lack, Secretary. Wells Construction Company, a corporation, by Charles T. Peterson, its President, Attest, Newton H. Peer, Secretary. Geo. E. Vergowe. Simon Mettler."

It is perfectly apparent that the foregoing agreement is directly within the terms of Article VIII of the indemnity agreement sued upon.

(Plaintiff's Exhibit 2.)

"Plaintiff's Exhibit No. 10—Agreement, June 20, 1910, Between Wells Construction Co. and Peter Sandberg.

"AGREEMENT.

THIS AGREEMENT made and entered into this 20th day of June, 1910, between the Wells Construction Company, a corporation, of Tacoma, Washington, and Peter Sandberg of the same place,

WITNESSETH: That whereas the Wells Construction Company has heretofore on the —— day of ———, 1910, entered into a contract with the Powell River Company of Vancouver, B. C., for the construction of a dam

and canal on the Powell River, B. C., for a price approximating $175,000 and

Whereas the said Wells Construction Company has made application to the American Surety Company of New York to become surety on the bond of the said Wells Construction Company in the sum of $25,000 for the faithful performance by the said Wells Construction Company of the conditions of the said contract, and

Whereas the said American Surety Company of New York refuses to become surety upon the said bond of the said Wells Construction Company without some other person signing the application with the said Wells Construction Company for the said surety company to become surety upon the said bond, and

Whereas the said Peter Sandberg of Tacoma, Washington, has agreed to sign his name with the said Wells Construction Company on the application for the said bond agreeing to indemnify the said surety company in case it should be held liable on the said bond,

Now, Therefore, in consideration of the said Peter Sandberg signing the said application with the said Wells Construction Company for the said surety company to become surety upon the said bond, the said Wells Construction Company agrees to re-pay to the said Peter Sandberg any money or moneys which he may

be required to pay to the said American Surety Company of New York by reason of his signing the said application with the said Wells Construction Company for the said surety Company to become surety upon the said bond and to hold the said Peter Sandberg harmless by reason of his assigning the aforesaid application.

WELLS CONSTRUCTION COMPANY,
By SIMON METTLER,
President.
By JOE WELLS,
Secretary.

We individually agree to hold said Peter Sandberg harmless by reason of signing said application for a bond above mentioned.

SIMON METTLER,
JOE WELLS."

The Court refused to consider these Exhibits as matter of law in anywise relative to the case so far as community was concerned; and this action is assigned as error,—13th Assignment, record, p. 261.

The trial court in its opinion had this to say of these transactions:—(Record p. 86.)

"Later, after that company got into financial difficulties, its stock was delivered to the attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save him-

self. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

But both these Exhibits 9 and 10 are actually and specifically covered by the VIIIth article of the indemnity agreement. (Plaintiff's Exhibit 2.)

The Law of the Case

The statutes of Washington relative to the property rights of husband and wife, among other things, provide:—

> "The husband shall have the management and control of community personal property with the like power of disposition as he has of his separate personal property," and "that the husband has the management and control of the community real property."

And the Supreme Court of Washington, in interpreting these statutory provisions, in McDonough v. Craig, a decision by Justice Hoyt, 10 Wash. 241, upon the question "whether or not the community property is liable for the debt incurred by the husband alone," said:—

> "In our opinion the first question above stated has been settled by the decisions of this court. In the case of Oregon Improvement Company v. Sagmeister, 4 Wash. 710 (30 Pac. 1058), we held that community property could be sold upon a judgment against the husband, rendered for an indebtedness incurred by the husband by reason of losses in business in which he was engaged, with which the wife had no connection further than that cast upon her, by the law, as a member of the community. In that case it was held that since under our stat-

utes the community was prima facie entitled to the profits of any business carried on by the husband, good conscience and fair dealing, as well as logic, required that it should abide the result of such business.

We are satisfied with the rule laid down in that case. A further consideration of the question has confirmed our convictions that everything rightfully done by the husband will be presumed to have been done in the interest of the community, and that such presumption will obtain unless it is made affirmatively to appear that the transaction in question related to his separate property. The legislature never could have intended that everything acquired by the husband as the result of any and every transaction in which he might be engaged should be presumed to be the property of the community, and at the same time not have intended that a like presumption should obtain as to any indebtedness or liability incurred on account thereof. Under the law as established by that case, it must be held that any liability incurred by the husband in the prosecution of any business is prima facie a charge against the community; and that the presumption to that effect will continue in force until it is overthrown by proof that such liability was not incurred in any business of which the community would have had the benefit, if profit had been realized therefrom."

In the late case of McElroy v. Hooper, the Supreme Court of Washington said, 70 Wash. 350:—

> "The husband has the management of the community property. As the community profits by his good judgment, so it must bear the losses of his mistakes. It cannot accept the one and repudiate the other."

In Miller v. Geary, 81 Wash. 217, at page 221, the Supreme Court, speaking through Judge Mount, confirms the repeated holding that the husband is the agent of the community and the community therefore liable for the acts and things thus done by him for it.

Woste v. Rugge, 68 Wash. 90, where the community is held liable for a tort on the theory of the husband's agency for the community business.

THE COURT REMEMBERS IN THIS CASE THE POSITIVE TESTIMONY OF BOTH SANDBERG AND WIFE THAT THERE IS NO OTHER PROPERTY OWNED BY ANY OR EITHER OF THEM THAN PROPERTY, REAL AND PERSONAL, ACQUIRED SINCE THEIR MARRIAGE AND THEREFORE THERE IS NO SEPARATE ESTATE OF EITHER OF THEM.

In a still later case, the Supreme Court of Washington, in Stuart v. Bank of Endicott, 82 Wash. 106, holds unqualifiedly that the community personal property, by reason of the above quoted statute, becomes impressed with all liabilities, either communal or personal.

Judge Hanford while on the Bench in this District decided the case of Levy v. Brown, 53 Fed. 568, and therein held that the community personal property was liable even for a debt of the husband alone.

The statutes of Washington further provide (Rem. & Bal. Sec. 5917), "Property, etc., acquired after marriage by either husband or wife or both is community property."

The Supreme Court of Washington, referring to the case of McDonough v. Craig, above quoted, and to later cases, fixed the character of a contract which the husband signed alone, and in the course of its opinion said:—

> "Under the statute, he has the management and control of the personal property. He had in his possession $1,074 of community funds which he desired to invest in this real estate. His wife objected. But he persisted in his desire and purchased the property. He had a right to do so, under the statute which gives him the management and control of the personal property. It will not do to say that, where one member of the community uses community funds against the wishes of the other member of the community and makes an investment, a mere objection of the other makes the property acquired the separate property of the one making the investment. And yet, if the contention of the appellants is sustained in this

case, that would be the result; for it is argued that, because Mrs. Murrey objected to the contract, it became the separate contract and liability of her husband."

Baker v. Murrey, 78 Wash. 241.

To the same effect is Johns v. Clother, 78 Wash. 615.

It is quite immaterial under the interpretation of the law made by the Supreme Court of Washington above shown and in the still later case of Way v. Lyric Theater, 79 Wash. 275, at page 278, whether any profit or benefit resulted from the transactions had and all evidence therefore as to whether or not Sandberg or Mrs. Sandberg received any money or benefit does not present any issue whatever; the test is, was the transaction under all the facts carried on for the benefit of the community. The evidence showing that there was nothing else than the community, neither Sandberg nor his wife having any other property to be benefited, the incontrovertible conclusion is that the transactions were for the community.

In the recent case of Bird v. Steele, 74 Wash. 70, the Supreme Court, speaking through Justice Chadwick, announces this doctrine:—

"Roberge and Steele were subcontractors, and engaged to do certain work for a stipulated price. They failed to meet the terms of their contract, and the firm is chargeable with the amount that Raftery paid for them. The

primary test in this, as it has been in all of the later decisions of this court, is to ascertain the character of the debt. If the debt is a separate debt of the husband, the community would not be bound. **If it is a debt incurred in the prosecution of a business or an enterprise out of which the community would have reaped a benefit, it is a community debt, and the husband and wife are principals in so far as their community property is concerned.** Measured by this standard, we have no doubt that the obligation assumed by Mrs. Steele was direct and not collateral; that she executed the contract as a principal and not as a surety. This court has held in a long line of cases, indeed, as it said in Floding v. Denholm, 40 Wash. 463, 82 Pac. 738, that a debt contracted by the husband in the prosecution of the community business renders the community property liable for the debt, is no longer an open question in this state. This principle has been applied to simple contract debts. Oregon Imp. Co. v. Sagneister, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; McKee v. Whitworth, 15 Wash. 536, 46 Pac. 1045; Philips & Co. v. Langlow, 55 Wash. 385, 104 Pac. 610. To an accommodation Indorser: Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402. To one liable for a superadded liability as a subscriber

to the stock of a corporation: Shuey v. Adair, 24 Wash. 378, 64 Pac. 536. To obligations incurred as a surety for a corporation in which the husband is a stockholder and the stock belonged to the community: Allen v. Chambers, 18 Wash. 341, 51 Pac. 478; Allen v. Chambers, 22 Wash. 304, 60 Pac. 1128. In an action for fraud and deceit: McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. And finally it was held that the community is liable for a tort committed by the husband when engaged in a business conducted for the benefit of the community. Milne v. Kane, 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913 A. 318, 36 L. R. A. (N. S.) 88; Woste v. Rugge, 68 Wash. 90, 122 Pac. 988."

This being the law of the State of Washington upon this subject, the Federal Courts follow the decisions of the highest Court of the State interpreting the law of the State with respect to property rights.

Buchser v. Morse, 196 Fed. 577 at middle of p. 579;

Affirmed by Circuit Court of Appeals, Ninth Circuit, 202 Fed. 854, at p. 856;

Note: (The foregoing decision was originally made by District Judge Rudkin);

In re Farrell, 211 Fed. 212, at p. 214;

Note: (A decision by District Judge Neterer);

Old Colony Trust Company v. City of Tacoma, 219 Fed. 780;

Note: (A decision by District Judge Cushman);

Seattle R. & S. Railway v. State of Washington, 231 U. S. 568, 58 L. Ed. 372.

Sandberg deliberately contracted in writing with the plaintiff that he was beneficially interested in the performance of the contracts of the Wells Construction Company and the law will not now permit him to deny that fact.

The plaintiff pleaded this contractual stipulation in its complaint and has again pleaded its contractual stipulation in its reply.

The decisions of the Supreme Court of the United States establish the worth of this plea and that Sandberg is estopped.

Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167;

United States v. Lamont, 155 U. S. 303, 39 L. Ed. 160;

Consumers Cotton Co. v. Ashburn (C. C. A. 5th Ct.), 81 Fed. 335;

George v. Tate, 102 U. S. 564, 26 L. Ed. 232.

In the case of Samuel Sprigg v. Bank of Mt. Pleasant, 10 Peters 257, 9 L. Ed. 416, the Supreme

Court of the United States at this early date announced the rule as follows:—

> "In this case the fact of the defendant's being surety is not only not admitted, but it is alleged that he is estopped from setting it up by his own admission in his obligation that he is principal. And we are not aware of any place giving countenance to such a defense at law, under such circumstances."

Merchants National Bank v. Murphy, 125 Iowa 609, 101 N. W. 442.

Argument

THE FIFTH, SEVENTH, TWELFTH AND TWENTY-NINTH ASSIGNMENTS OF ERROR CONSIDERED TOGETHER.

These assignments present what are believed to be the crucial questions of the case upon the record. They will be found coupled together at page 268 of the record, and separately stated at pages 258 and 259, and at 260 and 261. They present the following matters:—

> "Twenty-ninth. That the Court's rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to-wit: The said rulings for identification on this

assignment being referred to as A, B and C:

A. 'It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time.' (Record p. 258.)

B. 'It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company.' (Record p. 259.)

C. 'Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.' " (Record p. 261.)

If Sandberg's testimony be accepted as true, then Wells Construction Company was largely indebted

to Sandberg in June, 1910, upon contract, "defendants' exhibit A."

If Wells' testimony be also accepted as true, then Sandberg was owing the Company, and the Company was owing Sandberg, about June and October, 1910.

If Mettler's testimony likewise be accepted as true, then Sandberg was owing Wells Construction Company some considerable sum in June and August, 1910.

In any of these three specified conditions of evidence the conclusion is irresistible that the Sandberg community was materially concerned in the affairs and acts of Wells Construction Company.

All of the undisputed and uncontradicted circumstances show that Sandberg's intention and purpose was to take and obtain full indemnity for all liabilities the community assumed through him.

Particularly the payments for labor and for material that went into the building erected under "defendants' exhibit A."

(See checks to Tacoma Mill Company.)

(See checks to Grosser.)

(See checks to Olaf Halstead and others.)

Sandberg also testified he had to take the building over and finish it himself.

This undoubtedly was community business; and Sandberg took and obtained the agreements of June 20, 1910, and November 26, 1910, from Wells

Construction Company as indemnity against community liability therefor.

The joint answer of both defendants settled before trial upon the issues of fact and law admits all of the facts in this case entitling plaintiff to recover. Subsequently and at the time of trial the Court allowed the filing, over objection, of a separate answer for Mathilda Sandberg, wherein she eliminates the entire paragraph III of the joint answer heretofore filed and changes her plea of direct admission that a judgment against Peter Sandberg would be a cloud upon the title to the community real property. The defense of confession and avoidance as accommodation maker and surety is preserved in the old answer, against which plaintiff pleads estoppel.

June 20, 1910, Sandberg executed and acknowledged before notary public, plaintiff's exhibit No. 2, which is the indemnity agreement sued upon that among other things specified the construction then in progress of the building described in "Defendants' Exhibit A."

June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe, individually executed to Peter Sandberg an indemnity agreement specially to save the community estate of Sandberg and wife harmless from any liability under plaintiff's exhibit 2, then executed by Sandberg to enable Wells Construction Company to get its expected contract.

November 26, 1910, Peter Sandberg, Chas. T. Peterson, his attorney, and Rydstrom with Wells went to Vancouver about the business. On or prior to this date Mettler, Vergowe, Wells and Lund had turned over their stock to Peter Sandberg at a meeting at which Sandberg personally was present and where Chas. T. Peterson took manual delivery of the certificates of stock, and became president of the Wells Construction Company with Newton H. Peer secretary in the place and stead of Lund.

On the 3rd of October, 1910, Wells Construction Company rendered a statement to Sandberg claiming a balance of over thirty-five thousand dollars then due.

On November 29, 1910, three days after the arrangements had been completed with the Vancouver Banks about the trusteeship through Kentucky Liquor Company, Sandberg renders statement to Wells Construction Company claiming some three thousand dollars due the community personalty. These transactions alone demonstrate community interest.

But on November 26, 1910, by agreement of Kentucky Liquor Company (Sandberg's business, and way of doing business) with Wells Construction Company, and Simon Mettler and George Vergowe individually, this Company of Sandberg's became trustee for Peter Sandberg and others, but

for Peter Sandberg specifically to indemnify and save him harmless from

(a) bond for and to Powell River Paper Company

(b) "claims and accounts."

Chas. T. Peterson, the attorney for Sandberg, swore on the stand, as a witness for his client Sandberg, that Elmer M. Hayden became successor trustee to Kentucky Liquor Company and the property described in the instrument of November 26, 1910, was foreclosed and sold in pursuance of its terms.

It is exceedingly important, if taken as true, that one of the banks absorbed all the proceeds, because thereby community liabilities were so much reduced, Sandberg relieved, and so much of the debt paid to and received by the bank then holding Sandberg's personal endorsement on the renewed note.

Between June 20, 1910, and November 26, 1910, Sandberg personally had made two or three trips to Vancouver, B. C., while Wells Construction Company was working on Powell River contract affecting the liabilities involved in the case at Bar.

Notably the visit of July, 1910, and of October 19, 1910, when guaranty agreements in writing providing for joint and several liability upon the part of Sandberg, Mettler, Vergowe and Wells were entered into with Molsons Bank touching financial operations of Wells Construction Company.

Moreover, the visit of Peter Sandberg to and with the Bank of Vancouver produced transactions intimately associated with that bank's participation in the trust agreement of November 26, 1910, under which Sandberg's company (Kentucky Liquor Company) was trustee.

It is the conceded fact as well as the sworn evidence that from and after marriage November 30, 1894, Peter Sandberg never owned, managed or held property separate and apart from the community.

Likewise Mathilda Sandberg had not then and has not other property than the community. The management and care of all of which by statutory law of the State and her expressed confidence and trust in her husband she left to him, and his and her attorneys, Bates, Peer and Peterson.

It is therefore indisputable that all acts and things done by these people were community acts and things, whether successful or not, and community transactions for which the community took its chance of liability.

Any liability, however, resulting could only be satisfied out of the community, and any indemnity given or benefit accruing could only be for that community.

When Sandberg originally signed the indemnity agreement, "plaintiff's exhibit 2," he and his wife both knew there was no other property existing than community property. When the agreement

was taken from Wells Construction Company to save harmless Sandberg from any liability, that liability so saved was community liability and hence intended community benefit.

When the trust agreement of November 26, 1910, was taken, the plain and evident and therein expressed purpose and intention was to protect the community through its agent, Sandberg.

It is the law and the fact, and Sandberg knew, that the community **personalty** was all under his care, control and management as the husband and therefore the rents, issues, incomes and revenue from the community **realty** were answerable to the created liability if it became necessary to enforce the plaintiff's exhibit 2; and in fact by unmistakable language, without any suggestion of excuse, Sandberg expressly stipulated and said in paragraph X of that exhibit that he and his then property (but he and his wife swear that then and now they had no other than community) was beneficially interested in the doings of Wells Construction Company and the issuance of the bond by the American Surety Company to Powell River Paper Company, Ltd., so that the contract might be obtained and the dam built out of which expected profit was to be derived.

The American Surety Company in good faith executed and performed its part, and has sustained and paid liability; although Sandberg was called on to defend, and did not; although Sandberg com-

munity was called on to pay and did not and yet has not.

Nevertheless the **only** property of either or all the defendants is confessedly community estate, both real and personal.

Material information was before the defendants and each of them through their attorneys.

Bates, Peer and Peterson were and are attorneys, in all the matters and during all the times mentioned in the scope of this case for the following named

(1) Peter Sandberg
(2) Mathilda Sandberg
(3) Wells Construction Company and respectively president and secretary thereof on November 26, 1910
(4) Receiver of Wells Construction Company
(5) Bank of Vancouver in Mettler bankruptcy proceedings
(6) Molsons Bank in Mettler bankruptcy proceedings
(7) Kentucky Liquor Company

each and all of whom featured themselves in this case with participating interests in the community management of community property by the community agent, Peter Sandberg.

The benefit accruing to the community from Sandberg's acts was allowing Wells Construction Company to get the bond so that it might proceed with its contracts and repay to Sandberg and his

wife the moneys moving between Wells Construction Company and Sandberg and his wife for the construction of the building described in "defendant's Exhibit A."

Two things were evident at the time Sandberg entered into the indemnity agreement with the plaintiff: **First,** that getting the contract from Powell River Paper Company would enable Wells Construction Company to get money to pay Sandberg back for the money he had advanced on his building, or enable the Wells Construction Company to complete the contract with Sandberg as to that building, or, **second,** Sandberg, by reason of the instruments executed to him, would be enabled to recoup for the benefit of the community the advances that he claims he already made, and these transactions all grew out of one and the same subject matter, to-wit, the relations of Sandberg with the Wells Construction Company, through his attorneys, through himself and through the witnesses who testified for him.

The Supreme Court of Washington, says in the McGregor case (58 Wash. top of page 80):—"The community having received the benefit should now be estopped from denying its liability."

Moreover, the judgment rendered in British Columbia in behalf of Powell River Paper Company is conclusive upon Sandberg and wife; they were notified and had an opportunity to defend; they could have defended and they did not do so,

and they are under the law laid down by Judge Donworth when a Judge of this Court and afterward affirmed by the Circuit Court of Appeals for this Circuit, concluded in all respects by that judgment.

Robbins v. Chicago, 4 Wall 657, 18 L. Ed. 430;

Washington Gas Light Company v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712, at p. 719;

Compagnie v. Burley, 183 Fed. 168 near foot of page.

Note: (A decision by District Judge Donworth in this same Court.)

Affirmed by Circuit Court of Appeals, Ninth Circuit, 194 Fed. 335.

The evidence is uncontradicted and unexplained that Peter Sandberg upon his oath, February 20, 1911, in a cause in the Superior Court, as per the complaint offered and received in evidence, wherein Peter Sandberg was plaintiff and Simon Mettler and others defendants,—that he, Peter Sandberg, then stated and swore:—

"That on or about August, 1910, Wells Construction Company, Simon Mettler and his wife, George Vergowe and his wife and Joe Wells and his wife entered into an oral agreement with plaintiff wherein and whereby, in consideration of plaintiff's endorsing certain

notes, bonds and guarantees hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements for which said Wells Construction Company then held contracts, it was agreed that they * * * would convey by deed real property in Pierce County * * * to fully secure and indemnify plaintiff on account of his endorsement to said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business."

Therein also Peter Sandberg swore on his oath:—

"That Simon Mettler gave a list of all his property which he and his wife were to convey to Peter Sandberg pursuant to said agreement 'or as much thereof as plaintiff may deem necessary to protect, secure and indemnify him against liability in endorsing the notice and papers and in signing the guarantees and bonds * * * to enable them to obtain credit and money to carry on said contracting business.' "

And further Peter Sandberg swore in said complaint:—

"That pursuant to said agreement so entered into plaintiff on or about the —— day of Aug-

ust, 1910, went to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at its request and in accordance with said agreement * * * and signed an indemnity bond to said American Surety Company in the sum of $25,000.00 to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation."

And said Peter Sandberg in said complaint further swore:—

"That the liability of plaintiff on account of the bond * * * executed by him pursuant to said agreement * * * has not as yet and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be the sum will probably exceed $30,000.00 over and above the securities and indemnity already held by plaintiff."

The Supreme Court of the United States in Pope v. Allis, 115 U. S. 363, at p. 372, 29 L. R. A. 393, at page 397, holds that a pleading in an action at law sworn to by the party is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated.

Citing Elliott v. Hayden, 104 Mass. 180 and other cases.

The Supreme Court of the United States adhered to this rule with reference to affidavits or depositions wherein in the case of Chicago & Northwestern Railway Company v. Ohle, 117 U. S. 123, at p. 129, the Supreme Court says, speaking through Mr. Chief Justice Waite:—

> "We see no error of the admission of the affidavit in evidence. The affidavit having been filed in the cause by the company as a ground for obtaining an order of the court in its favor was competent evidence against it on the trial of another issue."

Citing Pope v. Allis, 115 U. S. 363.

It is also the rule in the Federal Courts,

General Electric Co. v. Jonathan Clarke, 108 Fed. 170.

One of the later State cases states the rule as follows:—

> "Any pleading or other paper filed by a party in a cause which states facts relevant to the issues in another cause in which the party filing said pleading or paper is also there a party, may be read as evidence in such cause then on trial against the party who made it as an admission in evidence of the facts stated.

Snyder v. Chicago Railway Co., 112 Mo. 527, 20 S. W. 885;

St. Paul Fire Marine Insurance Co. v. Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483;

Elliott v. Hayden, 104 Mass. 180.

In the case of Molsons Bank v. Peter Sandberg and wife in the Superior Court of the State of Washington for this County, Mathilda Sandberg stated in conjunction with her husband, her co-defendant, in that cause, that she knew that the Wells Construction Company was building a building, the amount of its contract price, the amount of payments thereon and how the work was progressing for the community estate composed of herself and her husband.

There can be no question that the work that Wells Construction Company was doing for the community was community work for the answer shows that the building was being erected upon what is described and pleaded as community property. As already shown the knowledge of the attorney is the knowledge of the client, notice to the attorney is notice to the client. Parties and their privies will not be permitted in a court of law to change their position to the injury and detriment of one who has acted on the faith thereof. The American Surety Company executed its bond and incurred liability thereon on the faith of the Sandberg community, and it is likewise unquestionable that the Sandberg community was upholding in all of the transactions Wells Construction Company

in the doing and carrying on of its business in order that the Sandberg community might be protected to the extent of its interest under its contract, "defendants' exhibit A," for the erection of the building and against any liability that might be incurred or come about through the endorsements and accommodations of Sandberg upon the other notes, claims and agreements which the agreement of November 26, 1910, positively states that he had assumed.

Hence it is that the community interest and no other interest than that of Peter Sandberg and his wife was or possibly could have been intended in the solemn stipulation that Peter Sandberg entered into as paragraph X of plaintiff's exhibit 2 on June 20, 1910, with American Surety Company, this plaintiff herein, and both of the defendants under the law are bound thereby.

It is quite immaterial to the case at bar what Sandberg's attorneys or himself were really doing or had theretofore done when on November 26, 1910, all of the stock of Wells Construction Company had actually come into their possession and control; and also quite immaterial what arrangements were made with the British banks; but it is enough to know and see from all of their acts and the documentary evidence in this case that all of the relations which all of them acted upon were regarded so far as joint and combined in interest that in every particular thing done from and inclusive of June, 1910, down to the failure of the

Wells Construction Company, Sandberg and those acting for him were taking every precaution to indemnify the community business managed by him and advised and directed by his attorneys, Messrs. Bates, Peer and Peterson, themselves officers of Wells Construction Company, in the interest of their community client.

It is a fundamental principle of law and an elementary rule of morals that innocent third persons without notice cannot without compensation be misled to their prejudice by the acts or omissions of any one. When Sandberg, therefore, who had no other than community interest to serve, acted in furtherance of his own supposed business interests and interlocked and combined his position as community manager with the Wells Construction Company affairs, he did so in carrying on community business. In fact, Judge Easterday in a recent case in the Superior Court of the State of Washington in Pierce County (Bankers Trust Company v. Peter Sandberg and wife, involving the business relations and operations of Sandberg with Lucas and Lucas Stronach Lumber Company) while commenting on similar dealings of Sandberg with others in that case, said:—

> **"The business relations and operations of Sandberg were so interdependent and so interlocked and so far in the possession and under the control of Sandberg that it cannot be said Sandberg was a mere accommodation maker of**

these notes signed by him with them. In view of all the circumstances it appears to the court that Sandberg signed these notes in the furtherance of his own supposed business interest and that the liability thereon is that of the community."

EIGHTEENTH TO TWENTY-FOURTH ASSIGNMENTS OF ERROR (RECORD PAGES 262 TO 266, BOTH INCLUSIVE) CONSIDERED TOGETHER.

These assignments relate to the exclusion and rejection by the Court of the evidence of R. H. Lund concerning whether or not Joe Wells had ever stated to him or whether he knew or whether from the accounts and books kept of the contract between Sandberg and Wells Construction Company he had ascertained **what Peter Sandberg was owing the Wells Construction Company on and after June, 1910.**

The Court even refused to allow the witness, Lund, to state as to what his knowledge was as to the amount of that particular indebtedness.

And it is assigned that the Court erred and abused its judicial discretion in respect of the whole course of the proceedings with respect to this witness, Lund.

It does not seem necessary to repeat all of the matters that took place which are covered so par-

ticularly in the assignments of error on pages 263 to 264 of the record. The Court will find, however, the whole of these proceedings set forth at pages 245 to 254, both inclusive.

The record of these proceedings with reference to the witness, R. H. Lund, are not long and the rulings of the Court were so prejudicial in respect of this witness's testimony to the plaintiff in error that the refusal of the Court to consider the same or allow him to testify or to consider the evidence in any way was necessarily an abuse of discretion, because such action is legally beyond reason.

> Dyer v. National Steam Nav. Co., 118 U. S. 520;
>
> Trustees v. Greenough, 105 U. S. 527.

That the Court committed a grave error is plainly observable from the Record, top of page 254, where he, as shown by the record, said with respect to this witness, Lund:—

> **"If he says that he did not say that I will have to disregard it."**

That the Court very unjustly treated this witness and the plaintiff in error appears quite clear from the statement and question in the middle of page 252 on cross-examination:—

> "Q. You did not state in that connection up there, did you, that the stock was transferred to Peer & Peterson in trust for Mr. Sandberg?"

to which the witness answered "No, sir."

Moreover, when this witness was asked what took place at the meeting of the stockholders during the latter part of October or early in November, 1910, in the Kentucky Building on Pacific Avenue, the witness answered, as shown on page 245 of the record, and specifically stated **that the certificates of stock were at that time turned over to Mr. Sandberg, or rather to Mr. Peterson being there as attorney for Mr. Sandberg.**

There was plain refusal by the Court to consider this evidence and to interpret it in accordance with the record; and this was prejudicial to the plaintiff in error because the Court should have found in accordance with the evidence but that it declined to do.

The assignments of error from Twenty-seventh to Thirty-eighth, inclusive, deal more or less with the matters already discussed.

But the Thirty-fifth assignment of error deals directly with the finding of fact XXV made by the Court against the evidence of R. H. Lund and based upon the ruling of the Court excluding the evidence of Lund.

The Court's finding XXV is upon pages 154 to 156 of the record and it will be observed that there is no reference whatever to the testimony of the witness, Lund, and that the finding is directly against the evidence.

Upon the whole case therefore as submitted by this record the plaintiff in error is surely entitled to a different judgment than was rendered by the Court below if the evidence offered is considered; and indeed the facts found by the Court when applied to the law require a judgment different than the Court reached in the case made.

Upon the defendants' own theory that the Wells Construction Company was solvent and able to pay all of its debts there was plainly no necessity for Sandberg to be taking indemnity from those who composed the Wells Construction Company upon account of any transactions he had with it. So it is perfectly plain, indeed conclusive, that what Sandberg was doing was for the benefit of protecting the community for which he was acting as the agent and in respect of which his wife was perfectly willing he should act, as the evidence nowhere discloses any objection; and of course neither of them can dispute what was done on the faith of what they promised to do as a community. The American Surety Company of New York did execute its bond, did sustain liability, and it gave its bond and incurred liability upon the faith of Peter Sandberg's contract, of which he had timely notice to defend in the Powel River suit served upon him **"at his residence"** and not at his place of business as the Court found apparently for the purpose, as

suggested by the defendant in error, of finding some excuse for the alleged want of the wife's knowledge.

Respectfully submitted,

WILLIAM C. BRISTOL,
Attorney for American Surety Company of New York,
Plaintiff in Error.

Portland, Oregon,
May 2, 1917.

In the United States Circuit Court of Appeals for the Ninth District

AMERICAN SURETY COMPANY,
a corporation of New York,
Plaintiff in Error,
vs.
PETER SANDBERG and MATHILDA SANDBERG, his wife,
Defendants in Error.

No. 2951.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief of Defendants in Error

CHARLES O. BATES,
CHARLES T. PETERSON,
Attorneys for Defendants in Error.
1107 National Realty Bldg., Tacoma, Wash.

In the United States Circuit Court of Appeals for the Ninth District

AMERICAN SURETY COMPANY,
a corporation of New York,
Pialntiff in Error,
vs.
PETER SANDBERG and MATHILDA SANDBERG, his wife,
Defendants in Error.

No. 2951.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief of Defendants in Error

STATEMENT OF THE CASE.

The statement made by plaintiff in error does not extend beyond a partial statement of the issues involved as made by the pleadings. We will therefore take it upon ourselves to make a full statement of the facts of the case.

This action was commenced by plaintiff in error against defendants in error to recover judgment

against defendants in error on an agreement of indemnity executed by defendant Peter Sandberg to plaintiff, under date June 2nd, 1910, to indemnify it against liability or loss by reason of its executing a certain bond in the sum of twenty-five thousand dollars, in behalf of Wells Construction Company, a corporation, obligor, to Powell River Paper Company, of Vancouver, British Columbia, obligee, to secure the performance of a contract theretofore entered into between the Wells Construction Company and the Powell River Paper Company.

See Plaintiff's Exhibit No. 2, Trans., p. 171.

The Wells Construction Company defaulted in the performance of its contract with the Powell River Paper Company and the Powell River Paper Company commenced an action in the Supreme Court of British Columbia, recovering a judgment therein against the Wells Construction Company and its surety, American Surety Company of New York, plaintiff in error here, in the sum of twenty-five thousand dollars.

See Plaintiff's Exhibit No. 5, Trans., p. 172.

Defendant Mathilda Sandberg appearing separately answered plaintiff's complaint admitting that her co-defendant, Peter Sandberg, signed and subscribed the indemnity agreement, Exhibit 2, and alleged that said Peter Sandberg executed the same for the sole use, benefit and accommodation of the

Wells Construction Company, a corporation, and that he did not sign or execute the same for the use, benefit or profit of himself, or of her, or either of them, nor for the use, benefit or profit of the community consisting of defendants, or for any purpose in which defendants, or either of them, or the community consisting of defendants, was interested in any manner whatsoever, and that so far as she and the community were concerned the same was without consideration.

See Separate Answer of Mathilda Sandberg. Trans., pp. 63-66.

She further pleaded affirmatively that she and her co-defendant, Peter Sandberg, married on November 30th, 1894, and ever since said time were husband and wife, and then set forth, describing in detail, certain real property, all of which she alleged was acquired after their marriage by their joint efforts, and not by gift, bequest or inheritance, and that the same was community property, and prayed that whatever judgment, if any, should be recovered against her co-defendant, Peter Sandberg, should be adjudged and decreed to be his separate debt, and not her debt or obligation, nor a debt or obligation of the community consisting of herself and husband, Peter Sandberg, and further prayed that said judgment be adjudged not to be a lien on the community real property of defendants.

Trans., pp. 66-69.

The answer of defendant Mathilda Sandberg being in effect that the indemnity agreement sued upon in this action was executed by her co-defendant, Peter Sandberg, simply as an accommodation maker, and that therefore under the laws of the State of Washington there was no liability thereon against the Sandberg community.

A jury trial was waived by stipulation, and the cause was tried to the Court, resulting in a judgment against defendant Peter Sandberg in the full amount sued for, the Court holding, however, that it was his separate debt, and that the defendant Mathilda Sandberg and the community real property of defendants in error was not affected by the lien of said judgment, and dismissing the action as to Mathilda Sandberg.

See Judgment, Trans., p. 163.

From that portion of the judgment relieving defendant Mathilda Sandberg, and the community of Sandberg and wife from liability, plaintiff in error prosecutes this appeal.

The Court made elaborate Findings of Fact covering specifically and in detail the controlling features of the case, which will be hereinafter referred to.

We take it that the following facts are conceded:

That defendants Peter Sandberg and Mathilda

Sandberg married on November 30th, 1894, and are husband and wife.

That at the time of their marriage defendant Peter Sandberg had no property, except an equity in a small house worth about six hundred dollars. That thereafter he sold the house, and the money was expended by him without his keeping any separate account of the same.

That all of the real property described in the separate answer of defendant Mathilda Sandberg was acquired by purchase during the existence of the marriage relation between defendants in error by their joint efforts, and not by gift, bequest, or inheritance.

The following additional facts are established beyond controversy, viz:

That neither the defendant Peter Sandberg nor Mathilda Sandberg, his wife, were ever at any time stockholders in the Wells Construction Company.

Simon Mettler, Trans., p. 212.

Mathilda Sandberg, Trans., p. 183.

Peter Sandberg, Trans., p. 233.

Joseph Wells, Trans., p. 197.

Neither did either of said defendants have any interest, directly or indirectly, in the business of the Wells Construction Company.

Mathilda Sandberg, Trans., p. 183.

Peter Sandberg, Trans., p. 233.

Neither did said defendants, or either of them, participate in any way in the earnings or profits of the Wells Construction Company, or in any of its undertakings.

Peter Sandberg, Trans., p. 233.

In this connection the Court made the following Finding:

> "That neither of the defendants, Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company."

Finding No. XII, Trans., p. 137.

That neither of said defendants ever received anything, any property, advantage or consideration from the Wells Construction Company, or from the business in which it was engaged.

Simon Mettler, Trans., p. 211.
Peter Sandberg, Trans., pp. 234-238.

That defendant Peter Sandberg executed the indemnity agreement (Plaintiff's Exhibit 2) at the request of Simon Mettler and Joseph Wells, stockholders of the Wells Construction Company, without ever having received, and without the expectation, promise, understanding or opportunity of receiving any advantage, thing of value, opportunity to profit out of the transaction, either directly or indirectly.

Simon Mettler, Trans., pp. 210-211-214.
Joseph Wells, Trans., p. 199.

That Sandberg's act in signing the indemnity agreement was purely and solely an act of accommodation and friendship, for the sole use, profit and benefit of his friend Simon Mettler and the Wells Construction Company, and not for the use, profit or advantage, or in the prosecution of the community business of defendants Sandberg and wife, and not for the use, benefit or profit of either of them.

Simon Mettler, Trans., pp. 211-13-14-15.

In this connection the Court found:

> "That defendant Peter Sandberg signed the application or indemnity agreement (Plaintiff's Exhibit 2) at the request of, and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application."

Finding No. XII, Trans., p. 137.

The only dealings which the defendants in error had with the Wells Construction Company were a contract entered into by them with the Wells Construction Company for the building of a wing to the Kentucky Building, at the agreed price of thirty-three thousand dollars, which was in writing, and an oral agreement thereafter for the construc-

tion of an additional story for thirty-five hundred dollars.

Joseph Wells, Trans., p. 200.

Defendant's Exhibit "A," Trans., pp. 200-201.

Simon Mettler, Trans., p. 214.

The building was practically completed and paid for prior to June 20th, 1910, thirty-five thousand five hundred and fifty and 80/100 dollars in cash payments having been made between January 22nd, 1910, and June 18th, 1910, in addition to certain labor claims amounting to about fourteen hundred dollars.

Joseph Wells, Trans., p. 201.

Defendants' Exhibit "B," being eleven checks as follows:

Date.	By Whom Drawn.	Payee.	Amount.
Jan. 22, 1910.	Peter Sandberg.	Wells Construction Co.	$5,000.00
Feb. 12, 1910.	Peter Sandberg.	Joseph Wells ----------	1,550.00
Feb. 12, 1910.	Peter Sandberg.	Joseph Wells ----------	5,000.00
Marked, To apply on construction 1128 Pac. Ave. Bldg.,			
Mar. 3, 1910.	Peter Sandberg.	Wells Construction Co.	4,000.00
Mar. 17, 1910.	Peter Sandberg.	Wells Construction Co.	4,000.00
Apr. 9, 1910.	Peter Sandberg.	Wells Construction Co.	5,000.00
Apr. 23, 1910.	Peter Sandberg.	Joseph Wells ----------	2,000.00
Apr. 25, 1910.	Peter Sandberg.	Wells Construction Co.	1,000.00
May 19, 1910.	Peter Sandberg.	Wells Construction Co.	5,000.00
June 4, 1910.	Peter Sandberg.	Wells Construction Co.	1,500.00
June 18, 1910.	Peter Sandberg.	Wells Construction Co.	1,500.00

Besides seven checks amounting to fourteen hundred thirty-two and 25/100 dollars, paid on the order of Wells Construction Company.

Joseph Wells, Trans., p. 201.

At that time the building was estimated to be ninety-five per cent. completed.

Joseph Wells., Trans., p. 206.

In this connection the Court made the following Finding:

> "That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the building mentioned in the preceding finding for defendants, the contract price for which building, together with extras, was thirty-six thousand, five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand, three hundred eighty-three and 05/100 dollars ($36,383.05). That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatever in the relationship of defendants and Wells Construction Company, in the matter of the construction of said building and the signing of said indemnity agreement (Plaintiff's Exihibit No. 2)."

Finding No. XII, Trans., pp. 137-138.

That at said time, which was the time that Sandberg executed the indemnity agreement (Plaintiff's Exhibit No. 2), the Wells Construction Company was in good financial standing, and was amply able financially to carry out all of its contracts, and was paying its debts in the usual course of its business, and was able to complete its contract with Sandberg for the construction of the

wing to the Kentucky Building on its own account, without any aid or assistance from Sandberg, or anybody else.

Joseph Wells, Trans., p. 206.
Simon Mettler, Trans., p. 211.

In this connection the Court found:

> "That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course."

Finding No. XII, Trans., p. 138.

That subsequent to June 20th, 1910, the Wells Construction Company entered into other large contracts, and secured large loans of money from the Molsons Bank of Vancouver, B. C., of more than fifty-five thousand dollars, and the Bank of Vancouver, where it borrowed more than thirty-five thousand dollars. That nothing was ever said about the relations or business of the Wells Construction Company in connection with its contract with Peter Sandberg for the construction of the wing to the Kentucky Building in connection with Sandberg's signing of the indemnity agreement (Exhibit No. 2), and that the transaction with relation to the construction of the wing to the Kentucky Building had no relation or connection with Sandberg's act in signing the indemnity agreement (Plaintiff's Exhibit No. 2).

Joseph Wells, Trans., p. 200.
Simon Mettler, Trans., pp. 209-210.

That the only promise or agreement that Simon Mettler or Joseph Wells, or the Wells Construction Company, or any, or either of them, or anybody else made with Peter Sandberg in connection with his signing of the indemnity agreement (Plaintiff's Exhibit No. 2), was that he would in turn be indemnified against loss in accordance with the terms of the written agreement.

Plaintiff's Exhibit No. 10, Trans., pp. 226-231.

Simon Mettler, Trans., pp. 219-220-231.

That defendant Peter Sandberg endorsed the notes of the Wells Construction Company at the Bank of Vancouver and the Molsons Bank, and to indemnify him because of his endorsement certain real property was conveyed to the Kentucky Liquor Company as a trustee, for the sole use, benefit and protection of the Bank of Vancouver.

Simon Mettler, Trans., pp. 214-215.

Peter Sandberg, Trans., pp. 235-236.

C. T. Peterson, Trans., p. 244.

Defendants' Exhibit "E", Trans., p. 245.

That Simon Mettler agreed to convey to Sandberg, to indemnify him against loss for endorsing the note of the Wells Construction Company at the Molsons Bank, certain real property.

Peter Sandberg, Trans., pp. 240-241.

That the loan made by the Molsons Bank was

made on the 19th of October, 1910. Thereafter Sandberg, at the instance and request of the Molsons Bank, brought suit against Simon Mettler to require him to convey said property as indemnity for the use, benefit and protection of the Molsons Bank.

Peterson, Trans., p. 241.

Peter Sandberg, Trans., p. 240.

That Mathilda Sandberg never at any time acquiesced in, approved or ratified the acts of her husband Peter Sandberg in executing the indemnity agreement (Exhibit No. 2), and that she did not know that he had signed said indemnity agreement until after the commencement of this action.

Mathilda Sandberg, Trans., pp. 182-187-194.

We have grouped all of these facts, because the Court made one Finding referring to all of them, to-wit:

> "That defendant Peter Sandberg, without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guarantees to banks in British Columbia, referred to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guarantees so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guarantees and in signing and entering into the several agreements referred to in the tes-

timony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guarantees and other agreements, excepting said contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as trustee, the Kentucky Liquor Co., the Molsons Bank and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction

Company was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the indemnity agreement sued on herein (Plaintiff's Exhibit No. 2), and that said building contract, and the relationship of the parties thereto, was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was entirely independent thereof, and was not spoken of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building contract was not a consideration, and was not regarded as a consideration of any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to."

Finding No. XXIII, Trans., pp. 152-153-154.

In the latter part of November, 1910, it became apparent that the Wells Construction Company was about to fail, and because of being an endorser on a large amount of its notes, defendant Peter Sandberg was requested to meet with the officers of the company regarding its financial affairs. After a full discussion of the matter it was agreed that the capital stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of the stockholders of the Wells Construction Company, and not otherwise, and held by them until such time as defendant Peter Sandberg could make an

investigation into the affairs of the Wells Construction Company, and decide whether or not he would undertake to finance the company to enable it to carry out its contracts, so as to save himself, as far as possible, from loss. This was done, and an investigation had. Mr. Sandberg declined to finance the company, and so notified the stockholders, whereupon the stockholders directed Peer and Peterson, as trustees, to turn all of the stock of said corporation over to one Joseph Wells, which was done.

Peter Sandberg, Trans., p. 104.

The Court referred to this matter in its Finding No. XXV, as follows:

> "That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if the defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation and carry out

the contracts for the purpose of protecting, as far as possible, his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders, and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified the stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson, as said trustees, carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

Finding No. XXV, Trans., pp. 154-155-156.

And referring to this transaction in its opinion stated:

"Later, after that company got into financial difficulties, it stock was delivered to the

attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save himself. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

"A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

Trans., p. 86.

ARGUMENT.

The community property laws of the State of Washington place upon the wife a status with relation to the property rights of husband and wife so different from the other States having the communal system, that we deem it necessary to set forth the property statutes in full.

The Code, Remington's 1915 Codes and Statutes, provides:

"HUSBAND AND WIFE.

"Section 5915. SEPARATE PROPERTY OF HUSBAND.—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried."

"Section 5916. SEPARATE PROPERTY OF WIFE.—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

"Section 5917. COMMUNITY PROPERTY DEFINED—HUSBAND'S CONTROL OF PERSONALTY.—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

"Section 5918. COMMUNITY REALTY, CONVEYANCE OF, ETC.—The husband has the management and control of the community real

property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon."

"Section 5923. LIBERAL CONSTRUCTION.—The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. The chapter establishes the law of this State respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object."

It will be observed that the power of the husband cannot be extended so as to operate directly or indirectly to alienate or encumber the community real property, and inasmuch as the Supreme Court of the State of Washington has many times interpreted the sections of the statute set forth, and in view of the well established rule that the Federal Courts will follow the decisions of the highest court of the State interpreting the law of the State with respect to property rights, we will not extend our discussion of this question beyond a review of the decisions of our own State.

The case of *Brotten vs. Langert*, 1 Washington 73, seems to be the first well-considered case on the subject, decided by the Supreme Court of this State.

The Court, speaking through the late Justice Dunbar, well said:

> "The community, composed of husband and wife, is purely a statutory creation; and to the statute alone must we look for its powers, its liabilities and its exemptions. * * * The statute alone determines who the members of the community shall be, the manner in which it shall acquire property, and defines and limits not only the powers of the members of the community over said property, but protects it from acquisition by others, excepting in the manner specified. It also lays down its own rule of construction in the language of the act itself: 'The rule of common law that statutes in derogation thereof are to be strictly construed, has no application to this chapter. This chapter establishes the law of this territory respecting the subject to which it relates; and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.' Then the pertinent and vital question becomes, What was the object sought to be effected? Section 2396 provides, 'That every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property and to sue and be sued as if he or she were unmarried,' and Section 2398 abolishes 'all laws imposing civil disabilities upon a wife which are not imposed upon a husband,' and succeeding sections define what separate property is, and provide how it may be acquired and in what manner disposed of. So far the evident object

of the law is to place husband and wife on an equal footing in relation to property matters. Section 2409 is as follows: 'Property not acquired or owned, as prescribed in Sections 2400 and 2408, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.' This section discriminates in favor of one spouse only so far as is actually necessary for the transaction of ordinary business. Section 2407 provides that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. Section 2410 reads as follows: 'The husband has the management and control of the community real property; but he shall not sell, convey or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; provided, however, that all such community real estate shall be subject to the liens of mechanics and others, for labor and material furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.' Construing all the provisions of the chapter together, we cannot escape the conclusion that the object of the law was to protect (so far as is consistent with the transaction of ordinary business,

as we before observed,) one spouse from the misdeeds, improvidence or mismanagement of the other concerning property which is the product of their joint labors. It is in the nature of an exemption, and, as has been well said, 'exemption laws are upheld upon principles of justice and humanity.' The statute provides the ways in which this property can be alienated: First, the voluntary alienation by the husband and wife joining in the deed; second, by making it responsive to certain demands, constituted liens by the statute; and there is no other way contemplated. In fact, the very object of the law is to prevent its alienation in any other way. It expressly provides that the husband shall not sell, convey or encumber it, and he will not be allowed to do, by indirection or fraud, that which he is directly prohibited from doing. The practical result to the non-contracting spouse would be the same whether the law allowed the other spouse to directly convey the property, or allowed the title to pass through the medium of a sale on an execution flowing from a judgment to which he, or she, was not a party. It is the results the law regards; the modes are not important."

These principles have been adhered to by the Supreme Court of the State in all of its decisions involving community property liability since that time.

In the case of *Spinning v. Allen*, reported in 10 Washington 570, which was overruled on another proposition, the Court said:

"The contract being one of suretyship, of course the judgment stands upon the same

footing, and the further question is presented as to whether community real estate can be held on a judgment obtained upon a contract of suretyship entered into by the husband. We have held that debts contracted by the husband in carrying on a business which is prosecuted in the interests of the community are community debts, on the ground that as the community receives the benefits of such a business it should be held liable for the losses. But we have never held the community real estate liable for a suretyship debt. The Code (Gen. Stat., Section 1413,) expressly provides that neither spouse shall be liable for the separate debts of the other. When the community is not liable for a debt contracted by the husband concerning his separate property, for which he received a consideration, how can it be said that the community should be held for a debt contracted where there was no consideration received or implied, moving to either the husband separately or to the community, as in the case of a suretyship, where the consideration moves, and is intended to move, entirely to a third party? Certainly there can be no presumption in any way that the community is or could be benefited by the husband's becoming a surety. There would be much more reason in holding the community where the husband contracts a separate debt for which he receives a consideration, for indirectly the wife or the community might receive some benefit therefrom, but the statute aforesaid shuts off any such liability. It would be going a step beyond this to hold the community responsible on a suretyship debt contracted by the husband."

This case was afterward reversed on a finding that the debt sued upon was one for the benefit of

the community, the husband having endorsed the note of a corporation in which he was a stockholder.

In *Gunde v. Parke*, 15 Washington 393, the Court held that a promissory note made to evidence a debt, which was not for the benefit of the community, should not be collected out of the community real estate, although it was made by the husband and had passed into the hands of a *bona fide* purchaser for value before maturity.

The same rule has been consistently enforced in the following cases:

Horton v. Donohoe Kelly Bank Co., 15 Wash. 399.

Shuey v. Holmes, 22 Wash. 194.

McDonough v. Craig, 10 Wash. 239.

Shuey v. Holmes, 20 Wash. 13.

Dane v. Daniel, 23 Wash. 379.

Olson v. Springer, 60 Wash. 77.

Bird v. Steel, 74 Wash. 68.

Way v. Lyric Theatre Co., 79 Wash. 275.

Case Threshing Machine Company v. Wiley, 89 Wash. 301.

Where a husband signed a note as surety only and received no consideration, it was held not a community debt, and judgment against the community was denied.

Wilson v. Stone, 90 Wash. 365.

To cite further cases would be a work of supererogation.

It must be perfectly manifest to this Court that defendant Peter Sandberg executed the indemnity agreement ("Plaintiff's Exhibit No. 2") purely as a matter of accommodation for his old, long-time friend, Simon Mettler, without any hope, promise or opportunity of reward or compensation for himself, or his co-defendant, Mathilda Sandberg, or their community, as the trial court found. In order that the community estate of these parties should be bound to respond for the payment of this obligation it was essential that the trial court find that the transaction was one for the benefit of the community; that is, one in the prosecution of the business of Peter Sandberg and his wife; one out of which the community of Sandberg and wife would get something in the way of profit or compensation should the venture prove a success.

We readily concede that in order that this obligation be one of the community of Sandberg and wife, that it was not essential that the community did actually receive a benefit out of the transaction, but it was essential that the transaction was one in the prosecution of community business, one out of which the community would have received a benefit or profit, should the venture prove a success.

Viewing this case entirely from plaintiff's own

standpoint, it must fail in its efforts to recover a judgment against the community.

DEFENDANTS' EXHIBITS 9 AND 10.

Counsel contends, brief, pp. 21 and 26, that on June 20th, 1910, and on November 26th, 1910, the latter date being long after the making of the indemnity bond sued on here, the Wells Construction Company and Mettler and Vergowe, as individuals, entered into a writing with defendant Peter Sandberg to indemnify and save him harmless from any liability because of his signing the indemnity agreement, Plaintiff's Exhibit No. 2, and that in November, 1910, the agreement, Exhibit No. 9, was entered into, whereby certain property was conveyed to the Kentucky Liquor Company (a Sandberg corporation), as trustee, to be held by it, for the purpose of indemnifying defendant Sandberg from liability or loss by reason of his signing certain notes as surety for the Wells Construction Company, and by reason also of his having signed Plaintiff's Exhibit No. 2. Is it possible by any stretch of the imagination to conceive how the defendants, or the community of Sandberg and wife, could possibly profit in the least out of such a transaction? If the undertaking by the Wells Construction Company had proven a success and the contracts had been carried to completion, and it had made a handsome profit out of the undertaking, the only result to defendant Sandberg would have been that he would have been released from

liability on the bond, or rather on the indemnity agreement, Plaintiff's Exhibit No. 2, given plaintiff, and the Wells Construction Company and Mettler and Vergowe would have been released on their indemnity agreements to Sandberg. The venture having proven a failure, the notes not being paid, the property and indemnity conveyed to the Kentucky Liquor Company went to the creditors, the Bank of Vancouver and the Molsons Bank. Sandberg could not take any of it, neither did he do so. He might have paid the debt and then held the property as security for the moneys so advanced by him, but whenever the Wells Construction Company and Vergowe and Mettler tendered or paid to him the amount he would have paid out in that connection it would have been his absolute, positive duty to have caused the property to be reconveyed to them. In either event he could not profit. He had no advantage; he had no opportunity of profit or benefit. The mere fact that he signed a note as a surety for the accommodation of another, and then took some indemnity to protect himself, did not change the legal effect of the transaction from a separate undertaking of his to one in behalf of the community of himself and wife.

Referring to these transactions, Judge Cushman in the course of his opinion said:

> "A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself,

> so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

See Trans., p. 86.

At page 28 of plaintiff's brief (referring to Exhibits 8 and 9) we find the following statement:

> "The Court refused to consider these exhibits as matter of law in any wise relative to the case so far as community was concerned; and this action is assigned as error, 13th Assignment, record, p. 261."

As to Exhibit No. 9, the record shows Plaintiff's Exhibit No. 9 offered and received in evidence.

Trans., p. 220.

As to Plaintiff's Exhibit No. 10, the record shows (Exhibit No. 10), was over the objection of defendant Mathilda Sandberg, that it was irrelevant and immaterial, admitted in evidence.

Trans, p. 228.

Beginning on page 30, under the title, "The Law of the Case," plaintiff in error begins a discussion of the decisions of the State of Washington. It would serve no good purpose to follow his discussion in this particular. All of the cases to which he refers recognize in no unmistakable way the unvarying rule laid down in the early case of

Brotten v. Langert, 1 Wash. 73, to which we have called particular attention and quoted from at length.

On page 37 of its brief, plaintiff contends that Sandberg deliberately contracted in writing with the plaintiff that he was beneficially interested in the performance of the contracts of the Wells Construction Company, and is now estopped. This is undoubtedly true as to the defendant Peter Sandberg himself, but the estoppel would not operate as against Mrs. Sandberg, or as against the community.

On page 40 of its brief, plaintiff states that defendant Sandberg was largely indebted to the Wells Construction Company in June, 1910, upon the contract for the building of the Kentucky Building. The facts are, as the Court found,

> "That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the building mentioned in the preceding finding, for defendants, the contract price for which building, together with extras, was thirty-six thousand five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand three hundred eighty-three and 05-100 dollars ($36,383.05.) That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells

Construction Company in the matter of the construction of said building and the signing of said indemnity agreement, 'Plaintiff's Exhibit No. 2.' "

Trans., pp. 137-138.

On page 40 of plaintiff's brief we find the following unwarranted statement:

"All of the undisputed and uncontradicted circumstances show that Sandberg's intention and purpose was to take and obtain full indemnity for all liabilities the community assumed through him.

"Particularly the payments for labor and for material that went into the building erected under 'Defendant's Exhibit A.'

See checks to Tacoma Mill Company.

See checks to Grosser.

See checks to Olaf Halstead and others.

Sandberg also testified he had to take the building over and finish it himself."

The building was practically completed and practically paid for at the time plaintiff's bond was executed, and while Sandberg himself did put the minor finishing touches on the building the Wells Construction Company was amply able to do so. In this connection the Court found:

"That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course."

Trans., p. 138.

The agreements of June 20th, 1910, and November 26th, 1910, themselves show that they were taken by Peter Sandberg personally in his individual capacity, to protect himself against the accommodation endorsements made by him individually in behalf of the Wells Construction Company. Counsel for plaintiff makes the unwarranted statements all the way through his brief regarding these indemnity agreements, "Exhibits No. 9 and No. 10," that they were given to indemnify the community estate of Sandberg and wife, because of Sandberg executing the indemnity bond, "Exhibit No. 2." This is not the fact, as shown by the testimony and found by the Court.

In this connection see particularly the testimony of Simon Mettler, Trans., pp. 211-13-14-15, and the Court's Finding No. XII., Trans., p. 137.

Simon Mettler, Trans., pp. 210- 211-214.

Joseph Wells, Trans., p. 199.

which shows conclusively that Mathilda Sandberg never at any time knew of, acquiesced in, approved or ratified the acts of her husband in all of the matters and agreements referred to in this case, except the contract for the building of the Kentucky Building.

Mathilda Sandberg, Trans., pp. 182-187-194.

See particularly in this connection the Court's Finding No. XXIII.

Trans., pp. 152-153-154.

On page 43 of plaintiff's brief we find the following:

> "It is exceedingly important, if taken as true, that one of the banks absorbed all the proceeds, because thereby community liabilities were so much reduced, Sandberg relieved, and so much of the debt paid to and received by the bank then holding Sandberg's personal endorsement on the renewed note."

It will be borne in mind in this connection that the obligations to the Bank of Vancouver and the Molsons Bank were on the same basis as the transaction involved in this case. Sandberg endorsed the notes of Mettler and the Wells Construction Company to these institutions, as shown by the testimony, purely as an accommodation, and his liability and obligations to those institutions were separate, and were not those of the community, so that the fact that the indebtedness owing these institutions by the Wells Construction Company was reduced by a conveyance or sale of the property held in trust does not change the situation.

The witness Mettler, it will be remembered, testified regarding the circumstances leading up to the borrowing of the money from the Bank of Vancouver, substantially as follows:

> "We went to Vancouver and got Mr. Sandberg to go with us, and get some money from the Bank of Vancouver. Mr. Dewar was manager of the Bank of Vancouver, and he said to Mr. Sandberg, 'Why don't you get some security for putting your name on those notes?' and Mr. Sandberg said, 'No, I would

rather for you to secure yourself,' and that was understood. On the strength of that conversation he let us have twenty-five thousand dollars, and it was understood we were to come back to Tacoma and execute the deeds to the bank, and then they found that an alien could not hold land in the State of Washington, and it was then proposed that the land be deeded to the Kentucky Liquor Company as security for the bank."

Simon Mettler, Trans., p. 231.

In this connection defendant Peter Sandberg testified that Mettler asked him to go up to Vancouver to assist him in getting some money, and thereupon detailed a conversation with Mr. Dewar, manager of the bank, regarding the deeding of the property as security, and that he signed the note as a surety.

Peter Sandberg, Trans., pp. 235-236.

Witness Vergowe stated that Sandberg endorsed this Bank of Vancouver note purely as a matter of accommodation, and that it was agreed then that the property would be turned over to the Kentucky Liquor Company as security for the Bank of Vancouver alone.

Trans., p. 241.

The proceedings in bankruptcy show that this property was in fact turned over as security for the Bank of Vancouver alone, and not for the indemnity or security of anybody else, and was finally foreclosed and sold and bid in by it in reduction

of the indebtedness of the Wells Construction Company.

Exhibit "E," Trans., p. 245.

It will be seen from the foregoing that the obligations of Sandberg to the Banks of Vancouver were purely an accommodation endorsement for the Wells Construction Company, and was, and is, a separate debt and obligation of defendant Peter Sandberg, for which the community is not now, and never was, liable, so that any reduction of the liability due the Banks of Vancouver could in no wise result in a benefit or advantage to the community of Sandberg and wife.

On page 45 of his brief, counsel for plaintiff refers to the community personalty. The question of community personalty is entirely outside of this case. It might be that plaintiff on its judgment could reach the community personalty. If there is sufficient to satisfy his judgment there is no occasion for this writ of error.

The defendant Mathilda Sandberg in her own behalf, and in behalf of the legal entity, the community of Sandberg and wife, defended this case for the purpose of preventing a judgment being entered against the community, which would be a lien on their real property, setting up specifically and in detail a description of their real property. The fact that the husband has control of the community personalty under our law can have no bearing whatever on the situation as far as this defense

is concerned. It is a fact that Mr. Peer and Mr. Peterson were on November 26th, 1910, elected temporary secretary and president of Wells Construction Company, simply for the purpose of receiving and holding its stock in trust for its stockholders, and holding in *statu quo* while Mr. Sandberg investigated whether or not he would undertake to finance it. He accomplished this within the course of two or three days, and decided that he did not want to undertake to finance it, and the stock was immediately turned over as directed by the stockholders, so that the connection of Peer and Peterson as officers of said corporation did not continue over a period of but a few days.

See Court's Finding No. XXV., Trans, p. 154.

Peter Sandberg, Trans., p. 104.

On pages 46 and 47 counsel contends that Sandberg's executing of the indemnity agreement, "Exhibit A," resulted in the American Surety Company executing the bond to the Powell River Paper Company, and that enabled the Wells Construction Company to enter into a contract with it, and that the Wells Construction Company would make some money to pay Sandberg back for money he had advanced it on the Kentucky Building.

His argument and reasoning in this connection are a good deal like the old nursery rhyme, "The House that Jack Built."

In its complaint in this action, plaintiff alleged

that at the time the indemnity agreement sued on herein was executed by defendant Sandberg, that he was indebted to the Wells Construction Company in a large amount, and that by reason of his executing the indemnity agreement in behalf of the Wells Construction Company the Wells Construction Company postponed the time of payment of his debt to it, thereby resulting in a benefit to the community, and in that manner the community received a benefit all growing out of Sandberg's execution of the indemnity agreement.

See Paragraph XIII., Plaintiff's Complaint, Trans., p. 38.

See Paragraph X., Plaintiff's Reply, Trans., p. 54.

It is impossible to reconcile the two positions.

It is next contended that the judgment rendered in British Columbia in behalf of the Powell River Paper Company against plaintiff in error was conclusive upon Sandberg and wife, because Sandberg had notice of it. Counsel did not undertake to explain how Mrs. Sandberg could have intervened in that case even if she had been notified of its pendency and had an adjudication by the Supreme Court of British Columbia regarding the community nature of her husband's undertaking and the legal status of their real property in this State. The contention is too ridiculous to merit consideration.

Pages 48 to 52 of plaintiff's brief are devoted to a discussion of the proposition that a certain complaint verified by Peter Sandberg in an action brought by him against Simon Mettler was evidence against him. We have no quarrel with this contention; the complaint was admitted in evidence and considered by the Court.

See Op. Trans., p. 85.

Counsel for plaintiff in error cites in support of his position a case against Sandberg in the Superior Court of Pierce County, Washington *(nisi prius.)* If that court is to be regarded as an authority in this jurisdiction it might not be out of the way to suggest the fact that actions in behalf of the British Columbia banks were instituted against Sandberg and wife in the same court on the obligations of the Wells Construction Company and Mettler executed to those banks, and endorsed by Sandberg, which actions were defended on the same grounds as the defense made here, resulting in the same judgment as made by Judge Cushman in this action, which was not appealed from, and that the Honorable R. A. Ballinger, the learned author of "Ballinger's Law of Community Property," was counsel for the banks.

In view of the clear and convincing nature of the proof in this case, and the findings as made by the trial Court, we are quite at a loss to understand why this Court should be burdened with its review, as it seems to us well nigh impossible for a litigant

to make a plainer, clearer case entitling him to the relief demanded than was made by Mrs. Sandberg.

We respectfully submit that the judgment of the lower court should be affirmed.

CHARLES O. BATES,

CHARLES T. PETERSON,

Attorneys for Defendants in Error.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Plaintiff in Error,
vs.
PETER SANDBERG and MATHILDA SANDBERG, his Wife,
Defendants in Error.

No. 2951.

Petition for Rehearing

WILLIAM C. BRISTOL
For Appellant

PORTLAND PRINTING HOUSE CO., PORTLAND, OREGON

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Plaintiff in Error, vs. PETER SANDBERG and MATHILDA SANDBERG, his Wife, Defendants in Error.	No. 2951.

Petition for Rehearing

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

American Surety Company, plaintiff appellant, feeling itself aggrieved herein by the decision, judgment and opinion of this Court given and rendered on Monday, the 20th day of August, 1917, respectfully presents this its petition for rehearing and for cause and ground thereof doth respectfully show and present:

First:

The appellant submitted to this Court the particular features of the indemnity agreement or contract upon which the right of recovery was based, as follows, to-wit:

> "VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose."
>
> * * * * *
>
> "X. That the Surety also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for any-

thing due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

(See Record, pp. 24 to 26.)

covered by the 2nd Assignment of Error (Record, p. 257), and by the 12th Assignment of Error (Record, p. 261), and by the 29th Assignment of Error (Record, p. 268).

As well as in the assignments of the refusal of the Court to find the facts as requested in these particulars by the plaintiff and to make conclusions of law in these particulars as requested by the plaintiff.

The specific point being as set forth in the record as cited and in the brief (page 3 and following) and at pages 41, 44 and 45. The Court's attention is particularly directed to page 45 of the brief on this point.

The plaintiff in error respectfully submits that the Court's opinion goes upon the theory that because the lower Court has found certain facts and this Court is satisfied with the facts so found that the judgment is affirmed.

The trouble with this solution of the matter

is that the plaintiff in error submitted the legal proposition in two phases:

First:—If Sandberg did take as agent for the community indemnity then under his agreement with plaintiff in error that indemnity inured to it.

Second:—That when Sandberg as agent of the community signed the indemnity agreement saying that "such suretyship having been by the surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings," and upon faith of such a statement the plaintiff in error did execute its bond and did incur liability that the Court as a matter of law was required to enforce that agreement regardless of any other feature of the case.

Second:

It was moreover submitted to your Honors that however much indemnity Sandberg took for his own protection that indemnity under clause VIII of the indemnity agreement was necessarily assigned to the plaintiff in error, for the language of that particular clause of the indemnity agreement signed by Sandberg is as follows:

> "together with all other rights and remedies and demands which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the surety."

The record in this Court was prepared to sub-

mit and we respectfully insist that it did submit the legal proposition that after the plaintiff in error had put in its documentary evidence that upon the indemnity agreement signed by Sandberg alone liability followed against the community by reason of clauses VIII and X set out on pages 2 and 3 of the brief heretofore submitted to the Court.

The Court in its opinion obviously has this matter in mind because it distinctly quotes Sections 5917 and 5918 of Remington's Code and Statutes of the State of Washington as to the husband's management and control of the community real and personal property.

Indeed, there is no doubt of the husband's authorized agency by statute to act in all respects for the community.

Third:

So the proposition which is not decided or disposed of by this Court in its opinion filed on the 20th day of August herein is:

Whether as matter of law the husband who as agent for a community estate managing all of its property, and the evidence confessedly establishing that there was no other property whatsoever and that the husband had no individual property of his own, can with the solemnity with which these engagements were intered into sign a declaration, contract and statement of the weight and character herein appearing without any effect to bind the community?

What indemnity amounts to will always remain an open question in Washington unless this question is decided.

It is respectfully submitted that this question has not been decided on the record submitted to this Court.

Moreover, the attention of your Honors is respectfully asked to consider that when a court tries a case sitting as a jury its findings of fact are not entitled to any more sanctity or respect than those of a jury under similar circumstances.

In this case there were and are many assignments of error distinctly calling this Court's attention to the action of the Court below in excluding evidence from consideration which showed or tended to show or establish the contrary of the very things which the Appellate Court now says in its opinion were found by the trial Court.

Fourth:

This Court adopts the findings of the Court below apparently without consideration of the following assignments of error:

The third assignment which presented the matter that the Court rejected evidence of the knowledge of Mathilda Sandberg.

The fourth assignment that the Court rejected evidence of Mathilda Sandberg derived from her admissions made in interrogatories.

The seventeenth assignment relating to the rejection of evidence and in considering improper evidence.

The eighteenth assignment concerning the

Court's error in refusing to consider the testimony of the witness, Lund.

The nineteenth to twenty-third assignments of error relate likewise to rejection by the Court of competent evidence.

The twenty-fourth assignment of error (record, p. 265) sets forth *in extenso* the very proceedings which related to the matter of Peter Sandberg's actual holding of the stock in the Wells Construction Company and the delivery of it to his attorneys, Messrs. Bates, Peer & Peterson, who are confessedly the attorneys of Mrs. Sandberg. (Record, p. 266; middle of p. 195).

The application of these assignments of error referred to and which it seems the Court has entirely overlooked are very readily illustrated by examination of the proceedings on record, pages 183 to 191.

The Court's attention is particularly called to the matter on page 189 of the record.

The twenty-fifth and twenty-sixth assignments of error raise the specific questions on findings tendered to the Court and refused by the Court; conclusions of law tendered and refused by the Court; and exceptions to failure so to find and in finding as the Court did.

It is therefore respectfully submitted as impossible to conceive how this Court, without passing upon these questions, could, if it had examined the record, affirm all these proceedings and find no error.

It is thought that the Court, in writing the opinion that it has written, could not have investigated these questions because nothing is said

about them in the opinion save in so far as they are covered by the general statement in the opening words, *"We find no ground to disturb the findings of fact of the court below,"* and in the closing words, *"Upon the facts as found by the court below, and the law as it is established in the State of Washington, we find no error in the decree which is appealed from";* both of which propositions, however, entirely disregard succinct and pointed references to refusals to consider testimony to disregard offers to show facts upon which the opinion now turns and to consider course of proceedings which were prejudicial to the plaintiff in error.

If the Court will take the pains to examine (as it may not yet have had time to have done) record, pages 245, 247, 249, 250 and 251, there will appear proceedings upon the very matters upon which the opinion for affirmance has turned and from which it will appear that the action of the Court below was prejudicial to the plaintiff.

If for no other reason by the action of the Court below in excluding testimony relative to Mathilda Sandberg's knowledge and in excluding the testimony of Lund on the very points that the opinion of the Court now turns there should be a rehearing; and it is so respectfully requested and submitted.

WILLIAM C. BRISTOL,
Attorney for Appellant.

August 27, 1917.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA,
State and District of Oregon. } ss.

I, the undersigned, do hereby certify that I am counsel for the appellant, petitioner for rehearing in the above entitled cause and Court; that I prepared the foregoing petition for rehearing and that it is not interposed for delay, inconvenience or embarrassment; that in my judgment the grounds and reasons therein stated for the rehearing are well founded.

WILLIAM C. BRISTOL,
Counsel for Petitioner.

NO. 2454

United States
Circuit Court of Appeals
For the Ninth Circuit

OCCIDENTAL CONSTRUCTION COMPANY [A Corporation],
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court for the Southern District of California, Southern Division

NO._____

United States
Circuit Court of Appeals
For the Ninth Circuit

OCCIDENTAL CONSTRUCTION COMPANY [A Corporation],
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court for the Southern District of California, Southern Division

INDEX

1

In the United States Circuit Court of Appeals for the Ninth Circuit.

OCCIDENTAL CONSTRUCTION COMPANY, a corporation, *Plaintiff,*

vs.

No.———

UNITED STATES OF AMERICA, *Defendants.*

2

WRIT OF ERROR.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit.—SS.

The President of the United States to the Honorable Judge of the District Court of the United States for the Southern District of California, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said
3 District Court, before you, or some of you, between the Occidental Construction Company, a corporation, plaintiff, and the United States of America, defendant, a manifest error hath happened to the great damage of the said plaintiff, the Occidental Construction Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the

record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to the law and custom of the United States should be done.

WITNESS the Honorable Edward Douglass White, Chief Justice of the United States, this 19th day of February, A. D. 1917, and in the one hundred and forty-first year of the United States of America.

WM. M. VAN DYKE,

Clerk U. S. District Court, Southern District of California.

By LESLIE S. COLYER. *Deputy.*

The foregoing writ is hereby allowed.

(Seal)

OSCAR A. TRIPPET,

U. S. District Judge.

I hereby certify that a copy of the within writ of error was on the 19th day of February, 1917, lodged in the Clerk's Office of the said United States District Court for the Southern District of California, Southern Division, for the said defendants in error.

WM. M. VAN DYKE,

Clerk U. S. District Court, Southern District of California.

(SEAL) By LESLIE S. COLYER, *Deputy.*

7 Endorsements: Original 396 Civil.

In the United States Circuit Court of Appeals for the Ninth Circuit.

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

WRIT OF ERROR.

8 Filed Feb. 19, 1917.

WM. M. VAN DYKE, *Clerk.*

By LESLIE S. COLYER, *Deputy Clerk.*

M. M. Meyers and Charles E. Dow, 1022-25 Citizens Nat. Bk. Bldg., Los Angeles, Cal., Attys. for Plff.

9

10 *In the United States Circuit Court of Appeals for the Ninth Circuit.*

OCCIDENTAL CONSTRUCTION COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No.———

CITATION.

11

To UNITED STATES OF AMERICA, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City and County of San Francisco, State of California, in said Circuit, on the 20th day of March, 1917, pursuant to a Writ of Error, filed in the Clerk's office of the District Court of the United States for the Southern District of California, Southern Division thereof, wherein you are

12 Defendant in Error and the Occidental Construction Company is Plaintiff in Error, to show cause, if any there be, why, the judgment rendered for said Occidental Construction Company, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Oscar A. Trippet, District Judge of the United States, sitting as Circuit Judge at Los Angeles, California, within the said Circuit, this 19 day of February, in the year of our Lord 1917,

and in the Independence of the United States of America the 141st.

TRIPPET,

United States District Judge, Sitting as Circuit Judge.

Endorsements: Original No. 396 Civil.

In the United States Circuit Court of Appeals for the Ninth Circuit.

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CITATION.

Received copy of the within citation this 19 day of February, 1917.

ROBERT O'CONNOR, *Asst. U. S. Atty.,*

Attorney for Defendant.

Filed Feb. 19, 1917.

WM. M. VAN DYKE, *Clerk.*

By CHAS. N. WILLIAMS, *Deputy Clerk.*

M. M. Meyers and Charles E. Dow, 1022-25 Citizens Nat. Bk. Bldg., Los Angeles, Cal., Attys. for Plff.

16 *In the District Court of the United States, Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NAMES AND ADDRESSES OF ATTORNEYS OF
17 RECORD.

M. M. Meyers and Charles E. Dow, 1022-1025 Citizens National Bank Building, Los Angeles, California,

Attorneys for Plaintiff in Error.

Albert Schoonover and Robert O'Connor, Federal Building, Los Angeles, California,

Attorneys for Defendant in Error.

18

19 *In the District Court of the United States, for the Southern District of California.*

OCCIDENTAL CONSTRUCTION COMPANY, a Corporation organized under and by virtue of the laws of the State of California, a citizen of said State, having its principal office at Los Angeles, in the County of Los Angeles, State of California,

Plaintiff,

vs.

20 UNITED STATES OF AMERICA,

Defendant.

ENGROSSED AMENDED PETITION FOR MONEY ON CONTRACT.

Comes now the plaintiff and complains of the defendant above named, and for cause of action alleges:

I.

That the Occidental Construction Company is a cor-
21 poration organized under and by virtue of the laws of the State of California, and has its principal office at Los Angeles, in the County of Los Angeles, State of California, and is a citizen of said State.

II.

That on or about the 9th day of January, 1913, at Los Angeles, in the said County of Los Angeles, State of California, the plaintiff entered into an agreement with the defendant whereby the plaintiff leased and hired to the defendant certain mules and harness (the said har-

22 ness being therein and sometimes herein designated as "equipment"), a copy of which said agreement, together with the itemized list of the said mules and harness attached thereto, is hereunto annexed, marked Exhibit "A", and made a part hereof, and plaintiff adopts and makes the same a part hereof as fully as though herein set forth, and alleges that the said agreement was in words and figures as set forth in the said Exhibit "A."

III.

23 That the defendant kept and retained the said mules and harness, pursuant to the said agreement, until the 26th day of April, 1913; that the defendant paid for the rental of said mules and harness for all of said time up to and including the 31st day of March, 1913, and no more, except as hereinafter stated.

IV.

That the said contract provided that the defendant should, and the defendant therein agreed to, pay for
24 each and every head of mules crippled, injured or killed. That one (1) of the said mules, to-wit: that certain mule set out in the list attached to said contract as No. 15, was killed, to-wit: drowned, on or about the 10th day of April, 1913, while then and there in the possession of the defendant, and that the same was never returned to the plaintiff; that the reasonable value of the said mule so killed was the sum of One Hundred Seventy-five Dollars ($175.00).

V.

That the hire or rent of the said mule so killed as aforesaid for the period from the 1st day of April, 1913, to the 10th day of April, 1913 (the day on which said mule was killed), both inclusive, at the agreed rate of Ten Dollars ($10.00) per month was the sum of Three & thirty-three-hundredths Dollars ($3.33); that the hire or rent of the remaining ninety-nine (99) mules so hired as per the terms of said contract and used by the defendant for the period from the 1st day of April, 1913, to the 26th day of April, 1913, both inclusive, at the agreed rate of Ten Dollars ($10.00) per month was the sum of Eight Hundred Fifty-eight Dollars ($858.00), making in all the sum of Eight Hundred Sixty-one & thirty-three-hundredths Dollars ($861.33) for such hire and rental.

VI.

That the said contract provided that defendant should, and the defendant therein agreed to, take extra care of the said mules and equipment, and to return and deliver the said mules and equipment to the plaintiff herein at its yard in the City of Los Angeles, in the County and State aforesaid, at the termination of the lease and hiring in as good condition as when taken; that the defendant did not take extra care of the said mules and equipment, as provided in the said agreement, and did not return the said mules and equipment to the plaintiff in as good order as when received; that the said mules upon their return to the plaintiff as above set forth were

all of them in very poor condition, were emaciated and weak, and the plaintiff could not use, nor let the said mules to be used, nor any of them, on account of such poor, weak and emaciated condition, resulting from such lack of care as aforesaid, until the 1st day of June, 1913; that in order to restore the said mules to the condition in which they were when taken by the defendant plaintiff was compelled to allow the said mules to rest, and also to feed and care for them, to and including the 31st day of May, 1913.

VII.

That the hire or rent of the said ninety-nine (99) mules and harness from the 26th day of April, 1913, to the 31st day of May, 1913, inclusive, during which time the plaintiff was deprived of the use of the said mules by reason of their poor, weak and emaciated condition as aforesaid, at the agreed rate of Ten Dollars ($10.00) per month, was the sum of Eleven Hundred Twenty-two Dollars ($1122.00); that the reasonable value of the care and feed given to, bestowed upon and furnished to the said ninety-nine (99) mules for the period from the 26th day of April, 1913, to the 31st day of May, 1913, inclusive, during which time the plaintiff was deprived of the use of the said mules and harness, and which was necessary in order to put the said mules in proper workable condition, was and is the sum of Thirteen Hundred Fifty-eight Dollars ($1358.00); that plaintiff paid, laid out and expended for veterinary services in and about the care of the said mules for and on account of the sickness and

injury by the lack of care by the defendant, as above set forth, the sum of Twenty-four & fifty-hundredths Dollars ($24.50).

VIII.

That said contract provided that the defendant should and would return the said mules and harness to the plaintiff at its yards in the City of Los Angeles, State of California; that the defendant brought the said mules to the Santa Fe stock yards in the said City of Los Angeles and thereupon requested this plaintiff to unload the said mules and take them therefrom to the yards of the plaintiff in the said City of Los Angeles, and at such special instance and request of the defendant the plaintiff caused said mules to be unloaded at the Santa Fe stock yards in the said City of Los Angeles and taken therefrom to the yards of the plaintiff in the said City of Los Angeles, and paid, laid out and expended therefor the sum of Three Dollars ($3.00).

IX.

That said contract further provided that in case any of the said equipment with the mules, to-wit: the said harness, should be lost, destroyed or rendered unfit for service, or not returned, the defendant would pay the plaintiff the full value thereof; that the defendant did not return to the plaintiff certain of the said harness, to-wit: 1 chain harness, 8 bridles, 1 back & hip strap, 6 halters, 10 coupling chains, 10 breast straps, 18 pipes 42'' and 2 backbands 4½''; that the value of the

said harness so not returned was and is the sum of Forty-eight & forty-two hundredths Dollars ($48.42).

X.

That the said sums amount in all to Three Thousand Five Hundred Ninety-two & twenty-five-hundredths Dollars ($3592.25); that no part of the same has been paid except the sum of Four Hundred Sixty-five & sixty-six-hundredths Dollars ($465.66), on or about the 13th day of November, 1913, though payment thereof was often requested and demanded of the defendant by the plaintiff.

XI.

That the said contract further provided that in case said defendant should or did fail to comply with, or should violate any of the terms, provisions or conditions of the said contract, or fail to pay any portion of the said rent or hire when due thereon, as provided in the said contract, the defendant should pay any and all necessary and proper attorney's fees expended in any action for the enforcement of any of the conditions or provisions of the said contract; that plaintiff incurred attorney's fees in and about this action for the enforcement of the conditions and provisions of this contract hereinabove set forth in the sum of Five Hundred Dollars ($500.00), the reasonable value thereof, no part of which has been paid by the said defendant.

And for a further and second cause of action plaintiff alleges:

37 I.

That the Occidental Construction Company is a corporation organized under and by virtue of the laws of the State of California, and has its principal office at Los Angeles, in the County of Los Angeles, State of California, and is a citizen of said State.

II.

That on or about the 10th day of January, 1913, at Los Angeles, in the County of Los Angeles, State of California, the plaintiff entered into an agreement with
38 the defendant whereby the plaintiff leased to the defendant certain personal property, designated in the said agreement as "grading equipment," a copy of which said agreement, together with the itemized list of the said grading equipment attached thereto, is hereunto annexed, marked Exhibit "B", and made a part hereof, and plaintiff adopts and makes the same a part hereof as fully as though herein set forth, and alleges that the said agreement was in words and figures as set forth
39 in the said Exhibit "B".

III.

That the said agreement provided that the defendant should, and the defendant therein agreed to, take extra care of the said grading equipment and to keep the same in good order or repair at all times at its own expense and charges, and at the termination of the said lease or hiring to return the same to the plaintiff at its yards in the City of Los Angeles, County of Los Angeles, State of California, in as good condition as when

taken, ordinary wear and tear from use only excepted; and also further provided that in case any of said grading equipment should be lost, destroyed or rendered unfit for service or not returned to the plaintiff said defendant would pay to the plaintiff the full value of such portion thereof as should not be returned, and would also pay for any damage done to the said grading equipment; that the defendant failed to return a certain portion of said grading equipment, to-wit: the articles set out and enumerated in the list hereunto attached marked Exhibit "C" and made a part hereof as fully as though herein set forth; that the value of the said portion of the said grading equipment so not returned was and is the sum of Forty-two & seventy-eight-hundredths Dollars ($42.78); that a certain portion of the said grading equipment was not returned to the plaintiff in as good condition as when taken; ordinary wear and tear from use excepted; that the defendant did not keep the same in good order and repair and it was necessary for the plaintiff to have the said grading equipment repaired because of the failure of the defendant to keep the same in good order and repair, and the plaintiff laid out and expended for such repairs so made on account of such failure of the defendant the sum of Seventy & six-hundredths Dollars ($70.06), all as set forth in the itemized statement thereof and the list hereunto attached marked Exhibit "D" and made a part hereof as fully as though herein set forth, to the damage of the plaintiff in the sum of Seventy & six-hundredths Dollars ($70.06).

43 IV.

That said contract provided that the defendant should and would return the said grading equipment to the plaintiff at its yards in the City of Los Angeles, County of Los Angeles, State of California; that the defendant brought the said grading equipment to the Santa Fe Railway Spur in the said City of Los Angeles and thereupon requested the plaintiff to unload the said equipment and take the same therefrom to the yards of the plaintiff in the said City of Los Angeles, and at such
44 special instance and request of the defendant the plaintiff caused the said grading equipment to be unloaded at the Santa Fe Railway Spur in the said City of Los Angeles and taken therefrom to the yards of the plaintiff in the said City of Los Angeles, and the plaintiff paid, laid out and expended therefor the sum of Twelve & fifty-hundredths Dollars ($12.50).

V.

That the said sums amount in all to the sum of One
45 Hundred Twenty-five & thirty-four-hundredths Dollars ($125.34), no part of which has been paid, though payment thereof was often requested and demanded of the defendant by the plaintiff.

VI.

That the said contract further provided that in case said defendant should or did fail to comply with, or should violate any of the terms, provisions or conditions of the said contract, or fail to pay any portion of the said rent or hire when due thereon, as provided

46 in the said contract, the defendant should and would pay any and all necessary and proper attorney's fees expended in any action for the enforcement of any of the conditions or provisions of the said contract; that plaintiff incurred attorney's fees in and about this action for the enforcement of the conditions and provisions of this contract as hereinbefore set forth in the sum of One Hundred Dollars ($100.00), no part of which has been paid by the said defendant.

47

And for a further and third cause of action plaintiff complains of the defendant and alleges:

I.

Plaintiff adopts paragraphs I, II and III of the first cause of action hereinabove set forth and makes them a part of this third cause of action as fully and completely as though herein specifically set forth.

II.

48 That the said contract provided that defendant should, and the defendant therein agreed to, take extra care of the said mules and equipment, and to return and deliver the said mules and equipment to the plaintiff herein at its yards in the City of Los Angeles, in the County and State aforesaid, at the termination of the lease and hiring in as good condition as when taken; that the defendant did not take such care of said mules and harness, but took so little care thereof that they became injured and deteriorated in value, to the damage of the plaintiff in the sum of Two Thousand Six Hundred

Ninety-nine & seventeen-hundredths Dollars ($2699.17).

III.

That defendant has not paid the said sum of Two Thousand Six Hundred Ninety-nine & seventeen-hundredths Dollars ($2699.17), nor any part thereof.

And for a further and fourth cause of action plaintiff complains of the defendant and alleges:

I.

Plaintiff adopts Paragraphs I and II of the second cause of action hereinabove set forth and makes them a part of this fourth cause of action as fully and completely as though herein specifically set forth.

II.

That the said agreement provided that the defendant should, and the defendant therein agreed to, take extra care of the said grading equipment and to keep the same in good order or repair at all times at its own expense and charges, and at the termination of the said lease or hiring to return the same to the plaintiff at its yards in the City of Los Angeles, County of Los Angeles, State of California, in as good condition as when taken, ordinary wear and tear from use only excepted; and also further provided that in case any of said grading equipment should be lost, destroyed or rendered unfit for service or not returned to the plaintiff said defendant would pay to the plaintiff the full value of such portion thereof as should not be returned, and would also pay for any damage done to the said grading equip-

52 ment; that the defendant did not take such care of said grading equipment, but took so little care thereof that the same became injured and deteriorated in value, to the damage of the plaintiff in the sum of One Hundred Twenty-five & thirty-four-hundredths Dollars ($125.34).

III.

That defendant has not paid the said sum of One Hundred Twenty-five & thirty-four-hundredths Dollars ($125.34), nor any part thereof.

53 ———————

And for a further and fifth cause of action plaintiff complains of the defendant and alleges.

I.

Plaintiff adopts Paragraph I of the first cause of action hereinbefore set forth and makes the same a part of this fifth cause of action as fully and completely as though herein specifically set forth.

II.

54 That on or about the 9th day of January, 1913, at Los Angeles, in the County of Los Angeles, State of California, the plaintiff leased, hired and delivered to the defendant one hundred (100) head of mules and certain harness therefor for use by the defendant in certain work on the Mohave Indian Reservation in the State of Arizona. An itemized list of said mules and harness is attached to Exhibit "A" annexed to this complaint, which said list is hereby referred to and made a part hereof. Said mules when so leased, hired and

55 delivered by plaintiff to defendant were in good condition and were strong and fit for work, and said harness was in good condition and fit for use.

III.

That on or about the 10th day of April, 1913, one (1) of said mules was drowned while in the possession of the defendant; that on or about the 26th day of April, 1913, the ninety-nine (99) mules remaining and said harness were returned by defendant to plaintiff;
56 that defendant paid plaintiff for the use of said mules and harness up to and including the 31st day of March, 1913, but has not paid plaintiff for the use of the same for any period thereafter; that the reasonable value of the use of said mule that was drowned and harness therefor from April 1st, 1913, to April 10, 1913, is the sum of Three & thirty-three-hundredths Dollars ($3.33); that the reasonable value of the use of said ninety-nine (99) mules remaining and the harness therefor from said 1st day of April, 1913, to said 26th day of April,
57 1913, both inclusive, is the sum of Eight Hundred Fifty-eight Dollars ($858.00), making in all Eight Hundred Sixty-one and thirty-three hundredths Dollars ($861.33).

IV.

That defendant failed to take proper care of said mules and failed to return said mules to plaintiff in good condition, and because of defendant's failure to take proper care of said mules they were, when returned to plaintiff, in poor condition and weak and unfit for use and work and in such condition that plaintiff was un-

able to use them for the period from the 26th day of April, 1913, to and including the 31st day of May, 1913; that because of the weak and emaciated condition of said mules when returned to plaintiff by defendant, plaintiff was obliged to expend, and did expend, upon the care and treatment of said mules, and for and on account of the sickness, weakness and injury of said mules caused by the lack of proper care of same on the part of the defendant as hereinbefore set forth, the sum of Twenty-four & fifty-hundredths Dollars ($24.50) for veterinary services, and plaintiff was obliged to feed and care for said mules from the 26th day of April, 1913, to and including the 31st day of May, 1913, and the cost of said feed and care, in addition to said veterinary services, was the sum of Thirteen Hundred Fifty-eight Dollars ($1358.00). Plaintiff was deprived of the use of said mules on account of their said condition from the 26th day of April, 1913, to and including the 31st day of May, 1913, and the reasonable value of said use was the sum of Fourteen Hundred Forty-three & seventy-five-hundredths Dollars ($1443.75).

V.

That after plaintiff had bestowed said care and said veterinary services upon said mules as aforesaid, and after said mules had been rested and cared for and fed as aforesaid, said mules were, and continued to be, because of the said failure of defendant to give them proper care, of less value than they were at the time said mules were entrusted to defendant, and said mules had,

61 because of said improper treatment, deteriorated in value and were of less value to the extent of Seven Hundred Forty-two & fifty-hundredths Dollars ($742.50) than they were at the time said mules were hired by plaintiff to defendant, and plaintiff was damaged by said deterioration and loss of value to the amount of Seven Hundred Forty-two & fifty-hundredths Dollars ($742.50).

VI.

62 That defendant did not feed and care for said mules during a part of the period from the time when defendant received said mules to the time said mules were returned by defendant to plaintiff, and plaintiff was obliged to pay, and did pay, for feed for said mules and transportation of the feed to the place where said mules were, and for care of said mules, during a part of said period, to-wit: from the 14th day of April to the 21st day of April, 1913, the sum of Two Hundred Nine & thirty-hundredths Dollars ($209.30) for feed, the sum of
63 Fifty-three & fifty-hundredths Dollars ($53.50 for transportation of the same, and the sum of One Hundred Twenty-six Dollars ($126.00) for care of said mules.

VII.

That said sums amount in all to Four Thousand Eight Hundred Eighteen & eighty-eight-hundredths Dollars ($4818.88); that no part of the same has been paid except the sum of Four Hundred Sixty-five & sixty-six-hundredths Dollars ($465.66) paid on or about the 13th

64 day of November, 1913, and there is now due, owing and unpaid on account thereof the sum of Four Thousand Three Hundred Fifty-three & twenty-two-hundredths Dollars ($4353.22).

And for a further and sixth cause of action plaintiff complains of the defendant and alleges:

I.

Plaintiff adopts Paragraph I of the first cause of
65 action hereinabove set forth and makes it a part of this sixth cause of action as fully and completely as though herein specifically set forth.

II.

That between the 9th day of January, 1913, and the 1st day of July, 1913, both inclusive, at Los Angeles, in the County of Los Angeles, State of California, the defendant became indebted to the plaintiff for goods, wares and merchandise, and one (1) mule, sold and delivered by the plaintiff to the defendant, and for work
66 and labor done and performed by the plaintiff for the defendant, and for money paid, laid out and expended by the plaintiff for the defendant, all at its special instance and request, all of the reasonable value of Three Hundred Fifty-one & seventy-six-hundredths Dollars ($351.76).

III.

That defendant has not paid the said sum of Three Hundred Fifty-one & seventy-six-hundredths Dollars ($351.76), nor any part thereof.

67 And for a further and seventh cause of action plaintiff complains of the defendant and alleges:

I.

Plaintiff adopts Paragraphs I and II of the first cause of action hereinabove set forth and makes them a part of this seventh cause of action as fully and completely as though herein specifically set forth.

II.

Plaintiff adopts Paragraph II of the second clause of action hereinabove set forth and makes it a part of
68 this seventh cause of action as fully and completely as though herein specifically set forth.

III.

That while the said mules and their equipment and the said grading equipment were in the possession and under the control of the defendant, by its agents and representatives, the said defendant permitted the same to be taken out of its possession for and on account of an alleged claim for taxes claimed by the County Tax Col-
69 lector of the County of Mohave, State of Arizona, and that in order to obtain the release of the said mules and their equipment and the said grading equipment from the said Tax Collector the plaintiff was compelled to, and did, pay to the said Tax Collector the sum of Eight Hundred Twenty-seven & ninety-four hundredths Dollars ($827.94); that such payment was made under protest, and plaintiff reserved all of its rights in and about the said matter.

70 IV.

That defendant has not paid the said sum of Eight Hundred Twenty-seven & ninety-four-hundredths Dollars ($827.94), nor any part thereof except the sum of Two Hundred Twenty-five Dollars ($225.00) paid by the County Tax Collector of Mohave County, Arizona, on or about the 6th day of December, 1913.

V.

That in order to secure such release of the said mules, their equipment and the said grading equipment
71 plaintiff incurred an obligation for attorney's fees in the sum of One Hundred Fifty Dollars ($150.00).

VI.

That defendant has not paid the said sum of One Hundred Fifty Dollars ($150.00), nor any part thereof.

And for a further and eighth cause of action plaintiff complains of the defendant and alleges:

I.

72 That on or about the 9th day of January, 1913, at Los Angeles, in the County of Los Angeles, State of California, the plaintiff leased, hired and delivered to the defendant one hundred (100) head of mules and certain harness therefor for use by the defendant in certain work on the Mohave Indian Reservation in the State of Arizona. An itemized list of said mules and harness is attached to Exhibit "A" annexed to this complaint, which said list is hereby referred to and make a part hereof. Said mules when so leased, hired and delivered

73 by plaintiff to defendant were in good condition and were strong and fit for work, and said harness and said grading equipment were in good condition and fit for use.

III.

That on or about the 10th day of April, 1913, one (1) of said mules was drowned while in the possession of defendant; that on or about the 26th day of April, 1913, the ninety-nine (99) mules remaining and said harness were returned by defendant to plaintiff.

74

IV.

That defendant failed to take proper care of said mules and failed to return said mules to plaintiff in good condition, and because of defendant's failure to properly care for said mules they were, when returned to plaintiff, in poor condition and weak and unfit for use and work and in such condition that said mules had deteriorated in value and were of less value to the extent of Thirty-nine Hundred and Sixty Dollars ($3960.00) than

75 they were at the time said mules were hired and delivered by plaintiff to defendant, and plaintiff was damaged thereby to the amount of Thirty-nine Hundred Sixty Dollars ($3960.00).

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Three Thousand One Hundred Twenty-six & fifty-nine-hundredths Dollars ($3126.59), and the sum of Five Hundred Dollars ($500.00) attorney's fees; and for the sum of One Hundred Twenty-five & thirty-four-hundredths Dollars

($125.34), and the sum of One Hundred Dollars ($100.00) attorney's fees; and for the sum of Two Thousand Six Hundred Ninety-nine & seventeen-hundredths Dollars ($2699.17); and for the sum of One Hundred Twenty-five & thirty-four hundredths Dollars ($125.34); and for the sum of Six Hundred Seventeen & sixty-seven-hundredths Dollars ($617.67); and for the sum of Three Hundred Fifty-one & seventy-six-hundredths Dollars ($351.76); and for the sum of Six Hundred Two & ninety-four-hundredths Dollars ($602.94), and the sum of One Hundred Fifty Dollars ($150.00) attorney's fees; and for costs of suit; and for such other and further relief as to this Honorable Court may seem meet and just.

M. M. MEYERS,
CHARLES E. DOW,
Attorneys for Plaintiff.

79 EXHIBIT "A"

This Agreement, Made and entered into this 9th day of January, 1913, by and between the OCCIDENTAL CONSTRUCTION COMPANY, a corporation, party of the first part, and U. S. Indian Service, party of the second part, WITNESSETH:—

SAID PARTY OF THE FIRST PART, in consideration of the payments to be made and the covenants to be kept, done and performed by the party of the second
80 part as herein set forth, agrees to and does hereby lease to the party of the second part certain mules, and certain equipment to be used in connection with the grading work to be done by said party of the second part and in the working of and caring for said mules, consisting of One hundred (100) head of mules and one hundred & two (102) chain harness as per itemized list thereof hereunto attached and made a part hereof; said mules and equipment to be used at or near Mohave India Reservn., and to be delivered to the party of the second
81 part at the yard of said party of the first part in the City of Los Angeles, California, at the rate of Ten & no-hundredths Dollars ($10.00) per month per head of mules including the equipment delivered therewith, until such time as this lease shall be terminated by notice given as herein provided.

AND SAID PARTY OF THE SECOND PART does hereby agree to pay to the party of the first part for the use and hire of said mules and said equipment at the said rate of Ten & no-hundredths Dollars ($10.00)

per month per head of mules, payable on the first day of each and every month, commencing with the 10th day of January, 1913, for the hire of said mules and equipment from the time of delivery thereof, or proportionate amount for any part of any month subsequent to the delivery thereof; the delivery and receipt of which said mules and equipment specified in said Itemized List is hereby acknowledged by said party of the second part; all such payments to be made at the office of said party of the first part in the said City of Los Angeles, California.

AND SAID PARTY OF THE SECOND PART does agree to take extra care of the said mules, to keep them well shod when necessary, and to feed, care for, keep and maintain the said mules, during the said hiring, at its own expense and charges, and to return the said mules to the party of the first part at said City of Los Angeles at the termination of said hiring, and does agree to pay for each and every head of mules crippled, injured or killed. Should any of said mules be taken sick, the party of the second part does agree to furnish immediate proper and skilled medical attention and necessary medicines, and such proper and skilled medical attention and care during the continuance of such sickness, and also to notify the party of the first part at once of the full particulars of such sickness; and should any of said mules die by reason of the failure of said party of the second part to perform any of the provisions of this agreement, then said party of the second part shall and

will pay full value for the same.

Should any of the said mules die from any cause whatsoever, under any conditions, said party of the second part does hereby covenant and agree to immediately notify the party of the first part of the cause of such death and to send to the party of the first part a piece of the hide, six inches (6 in.) square, cut from the dead mule and showing its brand "O" on the right hip, or right cheek, or both.

SAID PARTY OF THE SECOND PART does agree to take extra care of the said equipment and to keep the same in good order at all times, at its own expense and charges, and in case any of said equipment should be lost, destroyed or rendered unfit for service, or not returned, said party of the second part shall and will pay to said party of the first part the full value of the same, and shall also pay for any damage to the said equipment; and said party of the second part does agree to return and deliver the said mules and said equipment to the party of the first part, at its yard in said City of Los Angeles, at the termination of the term of lease and hiring as herein provided, in as good condition as when taken.

SAID PARTY OF THE SECOND PART does further agree that it will not remove the said mules or said equipment from the vicinity of said place nor sublet nor hire out any of the said mules or equipment or any part thereof, without the written consent of the party of the first part; and does further agree that it will produce

and exhibit to the party of the first part or its agent all and any of the said mules and equipment, at any time when so requested, on the work at the place above mentioned.

IT IS FURTHER PROVIDED AND AGREED that either party hereto may terminate this lease by giving a written notice of such termination, said notice to be delivered to the other party at least two (2) days prior to such termination, it being understood that this lease and hiring shall continue and be in full force and effect until so terminated by the giving of such notice, except as herein provided.

IT IS UNDERSTOOD AND AGREED that in case said party of the second part shall or does fail to comply with or shall violate, any of the terms, conditions or provisions of this contract, or fail to pay any portion of the said rent or hire when due thereon, as herein provided, or whenever said party of the first part shall deem it to its interests so to do in order to secure itself against loss, said party of the first part may take possession of any or all of said mules and equipment wherever found, and terminate the period of said hiring, and said party of the second part shall and will pay any and all necessary and proper costs and expenses incurred in and about the re-taking of the said mules and equipment and the return of the same to said City of Los Angeles, including attorney's fees expended in any action that may be instituted for the recovery of any of said property or for the enforcement of any of the provisions or conditions of this contract.

91 IT IS FURTHER PROVIDED AND AGREED that nothing in this agreement shall be construed as vesting in the said party of the second part any title, legal or equitable, in or to any of the above mentioned property, and said party of the second part does hereby waive any and all rights under and by virtue of the exemption laws of the State of California or any other state or country, as to any judgment secured by the party of the first part against it for or on account of this agreement.

92 IT IS UNDERSTOOD AND AGREED that all the mules and equipment leased by the party of the first part to the party of the second part hereunder shall be kept in one camp, and entirely separate and apart from any and all other camps and any and all other mules and equipment.

IN WITNESS WHEREOF, The said parties hereto have duly executed these presents, IN DUPLICATE, the day and year first above written.

93 No stock Received or Delivered on Sunday or Between 4 P. M. and 8 A. M.

OCCIDENTAL CONSTRUCTION COMPANY

By W. W. BRIER, *Pres.*

Party of the First Part.

UNITED STATES INDIAN SERVICE

By HUGH P. COULTIS, *Clerk & Spl. Disb. Agent,*

Party of the Second Part.

94 EXHIBIT "B"

This agreement, Made and entered into this 10th day of January, 1913, by and between the OCCIDENTAL CONSTRUCTION COMPANY, a corporation, party of the first part, and U. S. Indian Service, party of the second part, WITNESSETH:—

SAID PARTY OF THE FIRST PART, in consideration of the payments to be made and the covenants to be kept, done and performed by the party of the second
95 part as herein set forth, agrees to and does hereby lease to the party of the second part that certain equipment, consisting of grading equipment as per itemized list hereunto attached and made a part hereof, said equipment to be used at or near Mohave Indian Reservation, in connection with grading work to be done by said party of the second part, at the rate of Two hundred & seventy-three & twenty-hundredths Dollars ($273.20) per month, until such time as this lease shall be terminated by notice as herein provided.

96 AND SAID PARTY OF THE SECOND PART does hereby acknowledge the receipt in good order of the said equipment so set forth in said Itemized List hereunto attached, and does agree to pay for the use and hire thereof at the rate of Two hundred & seventy-three & twenty-hundredths Dollars ($273.20) per month, payable on the first day of each and every month commencing with the 11th day of January, 1913, for the use and hire thereof, or proportionate amount of any part of any month of the hiring of such equipment, all such pay-

97 ments to be made at the office of the party of the first part in the City of Los Angeles, California.

SAID PARTY OF THE SECOND PART does agree to take extra care of the said equipment and to keep the same in good order and repair at all times, at its own expense and charges, and in case any of said equipment should be lost, destroyed or rendered unfit for service, or not returned, said party of the second part shall and will pay to said party of the first part the full
98 value of the same, and shall also pay for any damage to the said equipment; and said party of the second part does agree to return and deliver the said equipment to the party of the first part, at its yard in said City of Los Angeles, at the termination of the term of lease and hiring as herein provided, in as good condition as when taken, ordinary wear and tear from use only excepted.

SAID PARTY OF THE SECOND PART does further agree that it will not remove the said equipment from
99 the vicinity of said place, nor sub-let nor hire out the said equipment or any part thereof, without the written consent of the party of the first part; and does further agree that it will produce and exhibit to the party of the first part or its agent all and any of the said equipment, at any time when so requested, on the work at the place above mentioned.

IT IS FURTHER PROVIDED AND AGREED that either party hereto may terminate this lease by giving a written notice of such termination, said notice

to be delivered to the other party at least ten (10) days prior to such termination, it being understood that this lease and hiring shall continue and be in full force and effect until so terminated by the giving of such notice, except as herein provided.

IT IS UNDERSTOOD AND AGREED that in case the said party of the second part shall or does fail to comply with, or shall violate, any of the terms, conditions or provisions of this contract, or fail to pay any portion of the said rent or hire when due thereon, as herein provided, or whenever said party of the first part shall deem it to its interest so to do to secure itself against loss, said party of the first part may take possession of any or all of the said equipment wherever found, and terminate the period of said hiring, and said party of the second part shall and will pay any and all necessary and proper costs and expenses incurred in and about the re-taking of the said equipment and the return of the same to said City of Los Angeles, including attorney's fees expended in any action that may be instituted for the recovery of any of said property or for the enforcement of any of the provisions or conditions of this contract.

IT IS FURTHER PROVIDED AND AGREED that nothing in this agreement shall be construed as vesting in the said party of the second part any title, legal or equitable, in or to any of the above mentioned property, and said party of the second part does hereby waive any and all rights under and by virtue of the ex-

emption laws of the State of California or any other state or country, as to any judgment secured by the party of the first part against it for or on account of this agreement.

IN WITNESS WHEREOF, The said parties hereto have duly executed these presents, IN DUPLICATE, the day and year first above written.

No Stock Received or Delivered on Sunday or Between 4 P. M. and 8 A. M.

OCCIDENTAL CONSTRUCTION COMPANY

By W. W. BRIER, *Pres.*,

Party of the First Part.

UNITED STATES INDIAN SERVICE

By HUGH P. COULTIS, *Clerk & Spl. Disb. Agent,*

Party of the Second Part.

106 That the original petition was verified as follows:

STATE OF CALIFORNIA,

County of Los Angeles.—SS.

W. W. BRIER, being first duly sworn, deposes and says: That he is the president of the Occidental Construction Company, a corporation, plaintiff in the foregoing and above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to
107 the matters herein stated upon his information and belief, and that as to those matters he believes it to be true; that he makes this affidavit for and on behalf of said corporation.

W. W. BRIER,

Subscribed and sworn to before me this 20th day of July, 1915.

(SEAL) M. M. MEYERS,

Notary Public in and for Los Angeles County, State of
108 *California.*

That the amendment to petition was verified as follows:

STATE OF CALIFORNIA,

County of Los Angeles.—SS.

W. W. BRIER, being first duly sworn, deposes and says: That he is the president of the Occidental Construction Company, a corporation, plaintiff in the foregoing and above entitled action; that he has read the

foregoing amendment to complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon his information and belief, and that as to those matters he believes it to be true; that he makes this affidavit for and on behalf of said corporation.

W. W. BRIER.

Subscribed and sworn to before me this 18th day of July, 1916.

(SEAL) M. M. MEYERS.

Notary Public in and for the County of Los Angeles, State of California.

112 Endorsements: Original No. 396 Civil.

In the District Court of the United States, Southern District of California.

OCCIDENTAL CONSTRUCTION COMPANY, &c.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ENGROSSED AMENDED PETITION FOR MONEY ON CONTRACT.

113 Filed Aug. 9, 1916.

WM. M. VAN DYKE, *Clerk.*

By CHAS. N. WILLIAMS, *Deputy Clerk.*

Received copy of the within Engrossed Amended complaint this 9th day of August, 1916.

ALBERT SCHOONOVER,
Attorneys for Defendant.

Removed to Suite 1022-23-24-25, Citizens National Bank Bldg.

CHAS. E. DOW and M. M. MEYERS, Attorney at
114 Law, 407-408-409 Henne Building, 122 W. Third St. Tel. Home A2092, Sunset Main 2258, Los Angeles, Cal.

115 *In the District Court of the United States, in and for the Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 396 Civil.

ANSWER TO PETITION FOR MONEY ON CON-
116 TRACT.

Comes now the defendant, United States of America, and for answer to plaintiff's petition herein, admits, alleges and denies:

I.

Defendant denies that on or about the 9th day of January, 1913, at Los Angeles, in the County of Los Angeles, State of California, or at any other time or place, plaintiff entered into an agreement with the defendant whereby the plaintiff leased and hired to the defendant
117 certain mules and harness, or any mules and harness, and denies that Exhibit "A" of said petition is the contract, or any contract, between the plaintiff and the defendant herein.

II.

Defendant denies that the defendant kept or retained the said mules and harness pursuant to said agreement until the 26th day of April, 1913, and denies that the defendant paid for the rental of said mules and harness for all of said time up to and including the 31st day

of March, 1913, and no more, except as in said petition after paragraph III of said petition, stated.

III.

Defendant denies that the said contract, or any contract, provided that the defendant should pay for each and every head of mules crippled, injured or killed, and denies that defendant agreed to pay the plaintiff for every or any head of mules crippled, injured or killed.

IV.

Defendant denies that the said contract, or any contract, provided that the defendant should take extra care of said mules and equipment, or take extra care of any mules and equipment, and defendant denies that the defendant did not take extra care of the said mules and equipment.

V.

Defendant denies that said contract provided that in case any of said mules and equipment, or the said harness, should be lost, destroyed or rendered unfit for service, or not returned, the defendant would pay the full value thereof to the plaintiff.

VI.

Defendant denies that the said contract, or any contract, provided that in case said defendant should or did fail to comply with, or should violate any of the terms, provisions or conditions of said contract, the defendant should pay any and all necessary and proper attorney's fees expended in any action for the enforcement of any of the conditions or provisions of said contract.

121 For a further and separate defense to said first cause of action herein, the defendant alleges:

I.

That on or about the 9th day of January, 1913, the plaintiff herein delivered to the United States Indian Service at Los Angeles, in the State of California, one hundred (100) mules, and the harness, collars, pads, lines, bridles, straps, halters, chains and snaps set forth in Exhibit "A" of plaintiff's petition herein, all of said
122 property to be used by said U. S. Indian Service in certain work and construction then being carried on and conducted by said U. S. Indian Service on the Mohave Indian Reservation in the State of Arizona, and at said time one Hugh P. Coultis, Clerk and Special Disbursing Agent of said U. S. Indian Service, stationed at Los Angeles, agreed that the said U. S. Indian Service would pay to the said plaintiff herein the sum of Ten ($10) Dollars per month per head for said mules, and that said U. S. Indian Service would return said mules to the City
123 of Los Angeles as soon as said work and construction above mentioned should be completed; that said work and construction was completed on the 9th day of April, 1913, and the said U. S. Indian Service did fully pay the said sum of Ten ($10) per month per head for each and all of said mules from the 10th day of January, 1913, up to and including the 14th day of April, 1913, except one mule for which said rental was fully paid up to the 10th day of April, 1913, at which time said one mule died; and defendant further alleges that said mule so

dying sank into the mud and water and drowned while being driven with other of said mules in a careful and cautious manner, and said mule so drowned and died without any negligence whatsoever on the part of the defendant herein.

II.

That defendant further alleges that on said 10th day of April, 1913, while said mules were being driven to the railroad station to be loaded on cars for transportation to the City of Los Angeles, to be returned into the custody of said plaintiff herein, the Tax Collector for the County of Mohave, in the State of Arizona, seized all of said mules then living, to-wit, ninety-nine (99) mules, the property of the plaintiff herein, and held the same under color of said office of Tax Collector of said County under a lien claimed by said officer for said State of Arizona, and said County of Mohave, for unpaid taxes thereon, and said seizure was so made by said officer without any fault or negligence on the part of the defendant herein, and on said day and immediately upon the seizure of said 99 mules by said officer, the said U. S. Indian Service did notify the plaintiff herein of the seizure of said mules and of the cause of said seizure by said officer, and did notify the said plaintiff that said seizure was under color of official right and because of the non-payment of taxes on said mules then and theretofore demanded by said officer; and defendant further alleges that without any fault or negligence on the part of defendant herein, or of said U. S. Indian Service, or of any officer of defendant herein or of said U. S. In-

127 dian Service, and against the will of said defendant herein, the said plaintiff herein being then and there duly notified of said seizure of said mules, the plaintiff herein refused to redeem the same or to procure the release thereof and did not redeem said mules or procure the release thereof until the 23rd day of April, 1913, at which time said plaintiff herein did pay the taxes and costs claimed and demanded by said Tax Collector of said County of Mohave, and did procure the release of said mules from said seizure, and said U. S. Indian Ser-
128 vice did then and there receive the custody of said mules, and immediately thereupon returned said mules to the City of Los Angeles, and into the custody of the plaintiff herein, and the said delivery into the custody of plaintiff herein was completed on the 26th day of April, 1913.

III.

Defendant further alleges that at all the times said mules and said harness were in the custody and care of
129 the defendant herein, the same and all thereof were carefully and without any negligence whatsoever used by said U. S. Indian Service in the service and work above mentioned, and at the time of said seizure of said mules by said Tax Collector, the said mules and each and all of them, were in good condition in like manner as they were when received by the said U. S. Indian Service from the plaintiff, and at said time of the delivery of said mules back into the custody of said plaintiff herein the said 99 mules and each and all of them were in like con-

130 dition that they were when again delivered and released into the custody of the said U. S. Indian Service by the said Tax Collector of said County of Mohave, on the 23rd day of April, 1913.

ANSWER TO SECOND CAUSE OF ACTION

The defendant for answer to second cause of action set out in the plaintiff's petition herein, admits, alleges and denies:

I.

131 Defendant denies that defendant entered into an agreement with the plaintiff, as alleged in paragraph I of said second cause of action, or at all, and denies that said contract, or any contract, was in the words and figures set out in Exhibit "B" of plaintiff's petition herein.

For further and separate answer to plaintiff's second cause of action herein, the defendant alleges:

I.

That on or about the 10th day of January, 1913, the U. S. Indian Service received at the City of Los Angeles
132 the blacksmith outfit, harness chest and cook outfit, tents and sundry equipment, as set out in Exhibit "B" of plaintiff's petition herein; all of said property to be used by the U. S. Indian Service on the Mohave Indian Reservation in connection with certain work and construction then being carried on by said U. S. Indian Service, for the use of which property the said Hugh P. Coultis, Clerk and Special Disbursing Agent of said U. S. Indian Service agreed to pay the sum of $273.20 per month, and that said U. S. Indian Service so used all of

said property and returned all thereof to the said plaintiff, except the property set forth and listed in Exhibit "C" of plaintiff's petition herein, and said U. S. Indian Service fully paid for the use of said property.

ANSWER TO THIRD CAUSE OF ACTION.

The defendant for answer to third cause of action set out in plaintiff's petition herein, alleges as follows:

Defendant adopts all of its answer to plaintiff's first cause of action, as set forth in its petition herein, and makes all of said answer to said first cause of action its answer to this the third cause of action in like manner as if all of the allegations, admissions and denials of said answer to said first cause of action were fully set forth herein.

ANSWER TO FOURTH CAUSE OF ACTION

The defendant for answer to fourth cause of action set out in plaintiff's petition herein, alleges as follows:

Defendant adopts all of the allegations of its answer to plaintiff's second cause of action, as set forth in its petition herein, and makes each and all of the allegations, denials and admissions of said answer to said second cause of action its answer to this the fourth cause of action in like manner as if said answer to said second cause of action were fully set forth herein.

ANSWER TO FIFTH CAUSE OF ACTION.

The defendant for answer to fifth cause of action set out in plaintiff's petition herein, alleges as follows:

The defendant adopts all of its answer to plaintiff's

136 first cause of action as set forth in its petition herein, and makes each and all of the allegations, denials and admissions of said answer to said first cause of action its answer to this the fifth cause of action in like manner as if said answer to said first cause of action were fully set forth herein.

ANSWER TO SIXTH CAUSE OF ACTION.

The defendant for answer to sixth cause of action set out in plaintiff's petition herein, alleges as follows:

137 Defendant adopts its answer to plaintiff's first cause of action as set forth in its petition herein, and its answer to plaintiff's second cause of action as set forth in its petition herein, and makes each and all of the allegations, admissions and denials of said answer to said first cause of action and said second cause of action in like manner as if said answer to said first cause of action and said second cause of action were fully set forth herein.

ANSWER TO SEVENTH CAUSE OF ACTION.

138 The defendant for answer to seventh cause of action set out in plaintiff's petition herein, alleges as follows:

I.

The defendant adopts its answer to plaintiff's first cause of action set forth in its petition, and its answer to second cause of action set forth in its petition herein, and makes said answer to said first cause of action and said answer to said second cause of action its answer to said seventh cause of action in like manner as if all of

139 the allegations, denials and admissions of said answer to said first cause of action and said answer to said second cause of action were fully set forth and re-written herein.

WHEREFORE, defendant prays judgment of this Court that the plaintiff take nothing by reason of its complaint herein, and for costs incurred in this action.

ALBERT SCHOONOVER,
United States Attorney.

M. G. GALLAHER,
140 *Assistant United States Attorney.*

141

142 Endorsements: No. 396 Civil.

In the District Court of the United States for the South. Dist. of California, Southern Division.

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER TO PETITION FOR MONEY ON CONTRACT.

143 Filed ....., 191.....

Filed Dec. 11, 1915.

WM. VAN DYKE, *Clerk.*

By T. F. GREEN, *Deputy Clerk.*

Rec'd. copy of the foregoing answer on this 11th day of Dec., 1915.

M. M. MEYERS,
Atty. for Plff.

144

145 *In the District Court of the United States, in and for the Southern District of California.*

OCCIDENTAL CONSTRUCTION COMPANY, a corporation organized under and by virtue of the laws of the State of California, a citizen of said State, having its principal office at Los Angeles, in the County of Los Angeles, State of California,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

146

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming on regularly to be heard before the Court without a jury, Honorable Oscar A. Trippet, Judge, on the 13th day of July, 1916, and the plaintiff appearing and being present in court and represented by counsel, M. M. Meyers, Esq., and Charles E. Dow, Esq., and the defendant being represented by M. G. Gal-

147 laher, Assistant United States Attorney for the Southern District of California, and evidence, both oral and documentary, having been introduced on behalf of the plaintiff, and evidence, both oral and documentary, having been introduced on behalf of the defendant, and the cause having been continued from day to day and time to time, and having been argued by respective counsel and submitted, and the Court having taken the matter under advisement, and having duly considered the matter, the Court finds the facts and conclusions of law as follows:

148 I.

On the 10th day of January, 1913, the defendant, by its Department of the Interior, through its Indian Service, was engaged in certain construction work upon and for the improvement of the Mohave Indian Reservation in the State of Arizona, and one F. R. Schanck was then a Superintendent of Irrigation in the employ of the defendant in said Indian Service, and was at said time in charge of said construction work on behalf of the defendant. One H. P. Coultis was the special disbursing
149 agent for said Indian Service, located at the City of Los Angeles, in the State of California, and was the disbursing agent for and pertaining to said construction work.

II.

The Occidental Construction Company was at said time and ever since has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in said City of Los Angeles, and was engaged
150 in the business of letting mules and grading equipment for hire.

III.

On or about the said 10th day of January, 1913, the said plaintiff delivered to the said F. R. Schanck, as agent of the defendant, 100 mules and certain grading equipment and harness, and other personal property as set out in Exhibit "B" in plaintiff's complaint herein, for use by the said United States in its said work on said Indian Reservation, which said mules, equipment,

151 harness and personal property were necessary for said work; and said Schanck agreed in behalf of the United States to take said mules and said other personal property so delivered to him for use by the United States from the corral of plaintiff at said City of Los Angeles to said construction work on said Indian Reservation in the State of Arizona and there use the same in the prosecution of said work until the completion thereof, and that defendant should thereafter return said mules and
152 equipment to plaintiff's corral in Los Angeles. Said Schanck and the said Occidental Construction Company agreed that the price to be paid by the United States for the use of said mules should be and was the sum of $10.00 per month for each mule, and that the price to be paid by the United States for the use of the said grading equipment, harness and other personal property so delivered to the said Schanck for the United States should be and was the sum of $273.50 per month.

IV.

153 Said Schanck caused said mules and equipment to be transported by the United States to said Indian Reservation and there to be used by the United States upon the said construction work until the completion of said work, which said work was completed on the 10th day of April, 1913.

V.

About said 10th day of January, 1913, and after plaintiff had agreed to let the mules and equipment to defendant, but before they had been delivered, plaintiff called the attention of said Schanck to certain blank

154 forms of contract and told the said Schanck that in all cases of letting any of their mules or equipment the terms of letting as to the care, use and return of the property were those contained in such forms of contract, and said Occidental Construction Company would not let such property to any person, nor even to the United States Government, except upon such terms and conditions and upon the signing of such written contract, and that in all cases they required such forms of contract to be signed by the hirer. Said Schanck replied
155 that he had no legal authority to sign such a contract and he believed nobody but the Secretary of the Interior would have such authority, but that he was constantly hiring mules for the Government and that these mules and the equipment were needed at once and that he supposed that he would sign the contracts. The statement of said Schanck that he was constantly hiring mules for the government and that these mules and the equipment were needed at once was true. Such contracts aft-
156 erwards were prepared by the plaintiff and forwarded to said Schanck by mail. Shortly thereafter and about the middle of January, 1913, the contracts were returned bearing the signature "United States Indian Service, Hugh P. Coultis, Clk. and Spl. Disbursing Agent." Exhibits "A" and "B" annexed to plaintiff's petition are copies of said contracts signed by said Coultis. Said Coultis was directed by said Schanck to sign said contracts and signed the same as above set forth with his knowledge. On or about the 30th day of January, 1913, plaintiff and the said Schanck executed the formal offer

157 and acceptance memorandum authorized by the Secretary of the Interior for the hiring of animals and other personal property by said Indian Service. The price to be paid for the use of the mules and equipment was the same in the offer and acceptance memorandum as in said contracts, Exhibits "A" and "B", and said formal offer and acceptance was used as the basis of the disbursement of all funds of the United States applied to the payment of the hire of said mules and other personal property, by the said Hugh P. Coultis, Special Disburs-
158 ing Agent of said Indian Service.

VI.

The said Mohave Indian Reservation has been set apart by an act of the Congress of the United States as a reservation for the habitation and use of Indians, and it was so inhabited and used at the time said mules were working thereon. The said work then being done by the United States thereon and in which said mules were used was the work of constructing a dike for the
159 improvement and betterment of said reservation and for the benefit of the Indians living thereon. Said work had been authorized by an act of Congress and Congress had made an appropriation therefor. Said reservation is within the territorial limits of the County of Mohave, in the said State of Arizona.

VII.

On or about the 7th day of March, 1913, the County Assessor of the County of Mohave, State of Arizona, assessed upon said mules and equipment state and county taxes. The amount of said taxes so assessed was $415.14.

160 The valuation placed upon said mules by the Assessor was $100 per head, and the value of said mules was not less than $100 per head. Said mules and equipment at the time of said assessment were upon said Reservation and were in the custody of the United States and were being used upon said work. Prior to the time when said County Assessor took possession of said mules, as hereinafter set forth, said mules and equipment, while within the territorial limits of the State of Arizona, were at all times upon said Reservation, which is within
161 the territorial limits of said Mohave County, and in use upon said work, excepting only while they were in transit from the California state line to said Indian Reservation and while they were in transit being returned from said Reservation for the purpose of being taken back by the United States to the plaintiff in California, and at all times until so taken possession of by said Assessor said mules and equipment were in the custody of the United States.

VIII.

162 Said work on said Reservation was finished on or about the 10th day of April, 1913, and thereupon said mules were driven from said Reservation to the railroad station at Topock, in said Mohave County, for the purpose of being shipped by the United States from there to Los Angeles. Said mules while being driven to Topock were in the custody of a person directed by said Schanck to drive the said mules to said station, and who was in the employ of the United States. While being so driven from the Reservation to Topock one of said

163 mules was drowned without negligence upon the part of any person. When the remaining 99 of said mules had reached Topock, and were then and there in the custody of a person in the employ of the United States, the County Tax Assessor of said Mohave County stated to said person that he would take possession of said mules. Said person replied to said Assessor, "that releases me and if said Assessor was an officer he would turn them over to him and go back to Needles." Neither said person nor any one else on behalf of defendant then made
164 any objection to said Assessor's taking possession of said mules, nor did anything to prevent it. Said assessor thereupon took possession of said 99 mules under a claim of lien because of said alleged tax and continued in possession thereof until on or about the 23rd day of April, 1913. It is provided by Arizona Civil Code, Section 4872, that in the event that an owner of personal property shall fail to pay the taxes assessed thereon, the Assessor "shall seize sufficient of said personal prop-
165 erty to satisfy the taxes and costs."

The plaintiff was notified by the employees of the defendant soon after said Assessor had taken possession of said stock that he had so taken possesesion, and shortly thereafter plaintiff communicated with said Schanck in relation thereto and was informed by said Schanck that he had taken the matter up with the United States District Attorney at Phoenix and that he expected to be able to secure the release of the stock without the payment of said alleged taxes. This expectation on the part of said Schanck and of the plaintiff continued

166 until on or about the 23rd day of April, 1913. On or about April 15, 1913, plaintiff informed defendant that if it was necessary to pay the tax to prevent a sale it would advance the money. Said Schanck replied requesting that plaintiff send the money, but saying that he would not pay it over unless necessary. On April 16 plaintiff sent to said Schanck sufficient money to pay the tax, together with the penalties then due, with the request that if he must pay the tax he do so under protest. During the period from the 10th to the 23rd of April said Schanck
167 was engaged more or less continuously in an effort to secure the release of the mules without payment of the alleged tax. On said April 23rd the plaintiff paid to a representative of the United States a further sum sufficient to pay the amount of said alleged tax, together with the costs and expenses then due, to wit: $825.94. Said sum was on said day paid under protest by the representative of the United States to said Tax Assessor, and the United States regained possession of said
168 stock and forthwith loaded the same into cars for the purpose of transporting the same to Los Angeles and there delivering the same to the plaintiff. Thereafter a refund of $225.00 was received by plaintiff from said County Assessor on account of said tax. The reason of said refund was a reduction in the tax rate.

IX.

While said mules were in the possession of the United States on said Reservation and were being used for said work thereon, they were properly fed. They were so negligently used, however, that the shoulders of

169 some of them were bruised and their necks were made sore to an extent beyond what would have resulted if proper care had been taken of them while they were being used in said work. While they were in the possession of the County Assessor the mules received no grain. During the day they were taken out to graze on the hills and at night when they were brought back to the corral some hay was given to them. During this period, however, they did not receive sufficient food, and in fact were nearly starved.

170 A man recommended by the plaintiff has charge of the corral from the time that the mules went to work on the Reservation until he left the job three or four weeks before the 5th of April, 1913. From the 5th of April to the 10th of April another man recommended by the plaintiff had charge of said corral. In each case this man was in the employ of the United States and was paid by the United States, and it was expressly stipulated between the plaintiff and the defendant that said man

171 should be subject to the orders of the United States foreman on the work who was in charge of said mules. Neither of these men had anything to do with the driving or working of the mules, nor did either of them have the decision of the amount of work to be done by the mules or the amount of feed to be given. Neither of said men was in any respect negligent in relation to said mules. The second man referred to made a report to the plaintiff regarding the condition of the necks and shoulders of the mules, but at the same time reported that the work was practically finished and that the mules would

172 be taken from the Reservation in three or four days; the mules were in fact taken off within two or three days after the said report was received by the plaintiff.

X.

The condition of the mules when they were delivered by the United States to the plaintiff in Los Angeles was due to their bruised necks and sore shoulders, as hereinbefore stated, and to their improper feeding while in the charge of the County Tax Assessor. During the time the mules were in charge of said Assessor the
173 plaintiff sent a telegram to said Schanck inquiring whether the mules were being properly fed, to which Schanck replied "mules being fed." Plaintiff had no knowledge that they were not being properly fed while in the custody of said Assessor. Said mules on their arrival in said City of Los Angeles were deteriorated in strength and flesh and were weak and emaciated, and unfit for work. Twenty-one of said mules had sore shoulders and sore necks, and on account thereof plaintiff was not able
174 to use said twenty-one mules until the 1st day of June, 1913.

XI.

Certain harness of the value of $48.42 was not returned by defendant to plaintiff. Certain grading equipment of the value of $42.78 was not returned by defendant to plaintiff, and certain other grading equipment was damaged through the negligence of the servants of the defendant to the extent of $70.06.

XII.

Defendant paid to the plaintiff in monthly payments

175 beginning in February, 1913, the rental value at the rate of $10.00 per month per mule of all of said mules from the 10th day of January, 1913, up to and including the 26th day of April, with the exception of the period from the 11th day of April to the 23rd of April, 1913, during which time the said mules were in the custody and care of the said Assessor of said Mohave County, Arizona; said sum of $10.00 per head per month was the fair and reasonable rental value of said mules. Defendant has never paid any rental for said mules for said last men-
176 tioned period. Defendant likewise paid the rental value of all of the said personal property other than said mules so delivered to said Indian Service from the 10th day of January, 1913, up to and including the day said other personal property was delivered to the plaintiff in the said City of Los Angeles.

XIII.

Neither the said Schanck nor the said Coultis had authority to make, execute or deliver the contracts set out
177 in Exhibits "A" and "B" annexed to plaintiff's petition, nor either of them. There was no ratification of said written contracts, or either of them, on the part of the United States. There was no estoppel against the United States to deny the validity of said written contracts, or either of them.

XIV.

The plaintiff paid the sum of $3.00 for the services of a man to unload said 99 mules and deliver them at the corral of plaintiff in the City of Los Angeles on the 26th day of April, 1913, and likewise paid the sum of $12.50

178 for the services of men to unload the personal property other than said mules and deliver it to the plaintiff at its corral in said City of Los Angeles; said men were employed by plaintiff to do this work at the request of said defendant. By reason of breakage in the grading equipment so had and used by the said Indian Service, which breakage was the result of the lack of ordinary care on the part of the persons using the same in the employ of the said Indian Service, the said grading equipment was damaged in the sum of $70.06; the said
179 personal property so received by the said Indian Service, but not returned to the plaintiff, was of the value of $91.20.

CONCLUSIONS OF LAW:

WHEREFORE, as a conclusion of law from the foregoing facts, the Court finds that the plaintiff is entitled to judgment against the defendant for the sum of One Hundred Seventy-six & seventy-hundredths Dollars ($176.00) and no more, and it is so ordered.

180 OSCAR A. TRIPPET,

United States District Judge.

181 Endorsements: No. 396 Civil.

In the District Court of the United States for the Sou. Dist. of California.

OCCIDENTAL CONSTRUCTION COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

182 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Filed ....., 191.....

Filed Oct. 25, 1916.

WM. M. VAN DYKE, *Clerk.*

By CHAS. N. WILLIAMS, *Deputy Clerk.*

183

184 *In the District Court of the United States in and for the Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY, a corporation organized under and by virtue of the laws of the State of California, a citizen of said State, having its principal office at Los Angeles, in the County of Los Angeles, State of California,

Plaintiff,

vs.

185 THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause coming on regularly to be heard before the Court without a jury, Honorable Oscar A. Trippet, Judge, on the 13th day of July, 1916, and the plaintiff appearing and being present in court and represented by counsel, M. M. Meyers, Esq., and Charles E. Dow, Esq., and the defendant being represented by M. G. Gallaher,
186 Assistant United States Attorney for the Southern District of California, and evidence, both oral and documentary, having been introduced on behalf of the plaintiff and of the defendant, and the cause having been continued from day to day and from time to time, and having been argued by respective counsel and submitted to the court for its consideration and decision, and the court, after due deliberation thereon, having made and filed its findings and decision in writing and ordered that judgment be entered in accordance therewith.

187 NOW THEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS CONSIDERED BY THE COURT, that the plaintiff, Occidental Construction Company, a corporation organized under and by virtue of the laws of the State of California, a citizen of said State, having its principal office at Los Angeles, in the County of Los Angeles, State of California, do have and recover of and from the defendant, UNITED STATES OF AMERICA, the sum of One Hundred Seventy-six & seventy-hun-
188 dredths Dollars ($176.70), together with its costs which were necessarily incurred and expended in establishing its claim to the following items mentioned in paragraph XIV of the findings, to-wit: $3.00 for services of a man to unload and deliver the mules mentioned therein, $12.50 for the services of a man to unload the personal property other than said mules and to deliver same to the plaintiff, and $70.06 for breakage, taxed at the sum of $43.80.

189 Judgment entered this 11th day of November, 1916.

WM. M. VAN DYKE,

Clerk.

By LESLIE S. COLYER,

Deputy Clerk.

190 Endorsements: No. 396 Civil.

In the District Court of the United States for the Sou. Dist of California, Southern Division.

OCCIDENTAL CONSTRUCTION COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

191 COPY OF JUDGMENT.

Filed Nov. 11, 1916.

WM. VAN DYKE, *Clerk.*

By LESLIE S. COLYER, *Deputy.*

2 Judg. Reg. 384.

192

193 *In the District Court of the United States, in and for the Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 396 Civil.

PETITION FOR WRIT OF ERROR.

194 Comes now the plaintiff herein and says that on the 11th day of November, 1916, this Court entered judgment herein in favor of the plaintiff and against the defendant for the sum of One Hundred Seventy-six & seventy-hundredths Dollars ($176.70) damages and Forty-three & eighty-hundredths Dollars ($43.80) costs, in which judgment and the proceedings at and prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

195 WHEREFORE, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

M. M. MEYERS,
CHARLES E. DOW,
Attorneys for Plaintiff.

196 Endorsements: Original No. 396 Civil.

In the District Court of the United States, Southern District of California, Southern Division.

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR WRIT OF ERROR.

197 Received copy of the within Petition this 29th day of Jan., 1917.

ROBERT O'CONNOR,

Attorney for Defendant.

Filed Feb. 19, 1917.

WM. VAN DYKE, *Clerk.*

By LESLIE S. COLYER, *Deputy Clerk.*

Removed to Suite 1022-23-24-25 Citizens National Bank Bldg. M. M. Meyers and Charles E. Dow, Attorney at Law. 407-408-409 Henne Building, 122 W. Third

198 St., Los Angeles, Cal. Tel. Home A2092, Sunset Main 2258.

199 *In the District Court of the United States, in and for the Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY,

Planitiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 396 Civil.

AMENDED ASSIGNMENT OF ERRORS.

The plaintiff in this action in connection with the
200 petition for writ of error herein makes the following amended assignment of errors, by leave of court first had and obtained, which it avers occurred in the trial, proceedings and judgment in this cause, to-wit:

I.

The Court erred in its conclusions of law, and said conclusions are incorrect and erroneous and inconsistent with and not supported by the findings of fact.

II.

201 The Court erred in holding that the defendant was not liable for injuries done to plaintiff's mules while said mules were in the actual possession of the defendant and in use by the defendant on the Mohave Indian Reservation.

III.

The Court erred in failing to award plaintiff damages for the injuries found by the Court to have been done to plaintiff's mules while said mules were in the actual possession of the defendant and in use by defendant on the Mohave Indian Reservation.

202 IV.

The Court erred in holding that the defendant was not liable for the injuries done to plaintiff's mules while said mules were in actual possession and custody of the County Assessor of Mohave County, Arizona.

V.

The Court erred in failing to award plaintiff damages for the injuries found by the Court to have been done to plaintiff's mules while said mules were in the actual possession and custody of the County Assessor of
203 Mohave County, Arizona.

VI.

The Court erred in failing to award plaintiff any sum as rental for the mules while they were in the custody of the County Assessor of Mohave County, Arizona.

VII.

The Court erred in failing to award plaintiff any damages because of the amount plaintiff paid to the County Assessor of Mohave County, Arizona, for feed
204 and transportation of feed and for care of the mules while they were in the custody of the County Assessor of said Mohave County, Arizona, and for the alleged tax.

VIII.

The Court erred in finding judgment for the plaintiff for only One Hundred Seventy-six & seventy-hundredths Dollars ($176.70) and not for the damages suffered by plaintiff because of the injuries to the mules while in the actual possession of the defendant and in use by the defendant on Mohave Indian Reservation and while in pos-

205 session of the County Assessor of Mohave County, Arizona, and said judgment is inconsistent with the findings of fact and with defendant's admissions in the pleadings.

M. M. MEYERS,
CHARLES E. DOW,
Attorneys for Plaintiff.

---

206 Endorsements: Original. No. 396 Civil.

In the District Court of the United States, Southern District of California, Southern Division.

OCCIDENTAL CONSTRUCTION COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

AMENDED ASSIGNMENT OF ERRORS.

207 Received copy of the within amended assignment of errors this 26th day of February, 1917.

ALBERT SCHOONOVER,
Attorney for Defendant.

Filed Feb. 27, 1917.

WM. VAN DYKE, *Clerk.*

By R. S. ZIMMERMAN, *Deputy Clerk.*

M. M. MEYERS and CHARLES E. DOW, Suite 1022-23-24-25, Citizens National Bank Bldg., Los Angeles, Cal. Phone Home 10131, Sunset Main 5017.

208 *In the District Court of the United States, in and for the Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 396 Civil.

ORDER ALLOWING WRIT OF ERROR.

209 On this 19th day of February, 1917, came the plaintiff, by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of writ of error and assignment of errors intended to be urged by it, praying also that a transcript of the record and the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises.

210 IN CONSIDERATION WHEREOF the Court doth allow the writ of error upon the plaintiff's giving bonds according to law in the sum of Three Hundred Dollars.

TRIPPET,

Judge.

211 Endorsements: Copy. No. 396 Civil.

In the District Court of the United States, Southern District of California, Southern Division.

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

212 Received copy of the within Order this..... day of ....., 1917.

Attorney for Defendant.

Filed Feb. 19, 1917.

WM. M. VAN DYKE, *Clerk.*

By LESLIE S. COLYER, *Deputy Clerk.*

Removed to Suite 1022-23-24-25, Citizens National Bank Bldg. M. M. Meyers and Charles E. Dow, Attor-
213 ney at Law, 407-408-409 Henne Building, 122 W. Third St. Tel. Home A2092, Sunset Main 2258, Los Angeles, Cal.

214 *In the District Court of the United States, Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff.

vs.

UNITED STATES OF AMERICA,

Defendant.

BOND.

KNOW ALL MEN BY THESE PRESENTS: That
215 we, the Occidental Construction Company, a corporation, as principal, and W. W. BRIER and F. R. MITCHILL, as sureties, are held and firmly bound unto the United States of America, the defendant above named, in the sum of Three Hundred Dollars ($300.00), to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs and executors, jointly and severally by these presents.

Sealed with our seal and dated this 15th day of Feb-
216 ruary, 1917.

WHEREAS, the above named plaintiff, the Occidental Construction Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in the above entitled cause on the 11th day of November, 1916, by the District Court of the United States, Southern District of California, Southern Division:

NOW, THEREFORE, the conditions of this obligation are such that if the above named Occidental Con-

struction Company shall prosecute said writ of error to effect and answer all costs and damages, including just damages for delay and cost and interest on the appeal if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

OCCIDENTAL CONSTRUCTION COMPANY,
By W. W. BRIER, President.

W. W. BRIER,
F. R. MITCHILL.

STATE OF CALIFORNIA,
County of Los Angeles.—SS.

W. W. BRIER and F. R. MITCHILL, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says:

That he is a resident and householder in the County of Los Angeles, State of California, and is worth the sum in said undertaking specified, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

W. W. BRIER,
F. R. MITCHILL.

Subscribed and sworn to before me this 15th day of February, 1917.

(SEAL) M. M. MEYERS,
Notary Public in and for the County of Los Angeles, State of California.

Approved this 19th day of February, 1917.

TRIPPET,
District Judge.

220 Endorsements: No. 396 Civil.

In the District Court of the United States, Southern District of California, Southern Division.

OCCIDENTAL CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BOND ON WRIT OF ERROR

221 Filed Feb. 19, 1917.

WM. M. VAN DYKE, *Clerk.*

By LESLIE S. COLYER, *Deputy Clerk.*

Removed to Suite 1022-23-24-25, Citizens National Bank Bldg.

M. M. Meyers and Chas. E. Dow, 407-408-409 Henne Building, 122 W. Third St. Tel. Home A2092, Sunset Main 2258, Los Angeles, Cal.

222

223 *In the District Court of the United States for the Southern District of California, Southern Division.*

OCCIDENTAL CONSTRUCTION COMPANY,

vs.

UNITED STATES OF AMERICA,

STIPULATION AS TO PRINTING RECORD.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the parts of the
224 record in this case hereinafter designated are the only parts material to the assignments of error made in this case, and that only the said designated portions of the record need by printed. The parts so designated are as follows:

1. Engrossed amended petition for money on contract. (Without items of list of mules and equipment.)
2. Answer to petition for money on contract.
3. Findings of fact and conclusions of law.

225

4. Judgment.
5. Petition for writ of error.
6. Amended assignment of errors.
7. Order allowing writ of error.
8. Bond.
9. Writ of error.
10. Citation.

M. M. MEYERS,
CHARLES E. DOW,
Attorneys for Plaintiff and Plaintiff in Error.

226 ALBERT SCHOONOVER, *U. S. Atty.*,
By ROBERT O'CONNOR, *Asst. U. S. Atty.*
Attorney for Defendant and Defendant in Error.

Endorsements: Copy. No. 396 Civil.

In the District Court of the United States, Southern District of California, Southern Division.

OCCIDENTAL CONSTRUCTION COMPANY, a corporation,

227 *Plaintiff,*

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION AS TO PRINTING RECORD.

Filed Feb. 27, 1917.

WM. M. VAN DYKE, *Clerk.*

By R. S. ZIMMERMAN, *Deputy Clerk.*

M. M. Meyers and Charles E. Dow, Suite 1022-23-24-
228 25, Citizens National Bank Bldg., Los Angeles, Cal.
Phone: Home 10131, Sunset Main 5017.

In the United States Circuit Court of Appeals

For the Ninth Circuit

OCCIDENTAL CONSTRUCTION COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 29

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Brief of Plaintiff in Error

M. M. MEYERS and CHARLES E. DOW,
1022-1025 Citizens National Bank Building,
Los Angeles, California,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals,

For the Ninth Circuit

OCCIDENTAL CONSTRUCTION COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Brief of Plaintiff In Error

STATEMENT OF THE CASE.

This is an action brought against the United States under the provisions of the act of March 3, 1887, commonly known as the Tucker act, 24 Stat. at Large, 505 Chap. 359, U. S. Comp. Stat, 1916, Vol. I, page 553. The facts are as follows:

In January, 1913, the United States were engaged in doing certain construction work upon the Mohave Indian Reservation in the State of Arizona for the improvement thereof and needed to secure at once mules and grading equipment for use in the work. Occidental Construction Company was engaged at the time in the business of letting mules and grading equipment for hire and its place of business was in the City of Los Angeles. One

F. R. Schanck was a superintendent of irrigation in the employ of the United States and was in charge of the said construction work on the Mohave Indian Reservation. On or about the 10th of January, 1913, Schanck, as agent of defendant in error, secured at said City of Los Angeles, from plaintiff in error one hundred head of mules and certain grading equipment and harness and other personal property for use by the United States in the work on said Reservation. The questions raised on this appeal relate only to the mules. Schanck agreed in behalf of the United States (Tr. fol. 151) to transport the mules from Los Angeles to the Reservation, there use them upon said work, and upon completion of the work to return them to the corral of the Occidental Construction Company in Los Angeles. Schanck and said Company agreed that the United States should pay ten dollars per month for the use of each mule, and a further sum for the use of the other personal property. Schanck caused the mules to be transported by the United States to said Indian Reservation, and they were there used by the United States upon said work until the completion of it on April 10, 1913.

After the Occidental Construction Company had agreed to let the mules and equipment, but before they had been delivered, the officers of the Company asked Schanck to sign the contracts, exhibits "A" and "B", attached to the petition. Schanck replied that he had no legal authority to sign such contracts, but that he was constantly hiring mules for the government and that he supposed he would sign the contracts. Schanck

was in fact constantly hiring mules for the United States. (Tr. fol. 155). The contracts, Exhibits "A" and "B", were afterwards signed by Hugh P. Coultis, a clerk and special disbursing agent of the United States Indian Service, who was directed by Schanck to sign them. The form of the signature was as follows: "United States Indian Service, by Hugh P. Coultis, Clk. and Spl. Disbursing Agent".

The District Court has found that neither Coultis nor Schanck had authority to execute the contracts Exhibits "A" and "B". Plaintiff in error does not on this appeal seek to overturn said finding or to establish liability on the part of the United States under said written contracts, but seeks to recover on the implied contract of the United States as bailees.

The Mohave Indian Reservation has been set apart by Congress as a reservation for the habitation and use of Indians. The work on which the mules were used by the United States was the construction of a dike thereon for the improvement of the reservation and for the benefit of the Indians living thereon. Congress by an act had authorized the work and made an appropriation therefor. The reservation is within the territorial limits of Mohave County, Arizona (Tr. fols 158, 159.).

The County Assessor of Mohave County on the 7th day of March, 1913, while the mules and equipment were upon the reservation, and were in the custody of the United States and were being used by them in said work, assessed upon them State and County taxes amounting to $415.14. The valuation placed upon the mules by the

assessor was $100 per head, and they were in fact worth not less than that amount (Tr. fol. 160). During the entire time that the mules were in Arizona they were on the Reservation, excepting only while they were in transit to and from the California line and while they were in the custody of the tax assessor.

The United States continued to use the mules in the work upon the reservation until April 10, 1913, when the work was completed. On that date Schanck directed a person in the employ of the United States to drive the mules from the reservation to the railroad station at Topock, located in said Mohave County, Arizona, a few miles from said reservation, to be shipped from there to Los Angeles. On the way to Topock one of the mules was drowned.

When the remaining ninety-nine mules reached Topock and while they were still in the custody of the person who had driven them there the County Assessor of Mohave County stated to said person that he would take possession of them. Said person replied that that released him and that if the Assessor was an officer he would turn them over to him. No one in behalf of the defendant in error then made any objection to the Assessor's taking possession of the mules or did anything to prevent it. The Assessor thereupon took possession of the mules under a claim of lien because of the alleged tax. Soon after the seizure of the mules defendant in error notified plaintiff in error that the mules had been seized. The officers of the company thereupon communicated with Schanck and were informed by him that he

expected to secure the release of the mules without payment of the alleged tax. This expectation on Schanck's part continued until on or about April 23rd. On or about April 15th plaintiff in error informed Schanck that if it was necessary to pay the tax to prevent a sale of the mules it would advance the money. In reply Schanck requested the Company to send the money to pay the tax, but said he would not pay it over unless necessary. On April 16th the Company sent Schanck sufficient money to pay the tax, together with the penalties then due. From the 10th to the 23rd of April, Schanck was engaged more or less continuously in an effort to secure the release of the mules without payment of the alleged tax. On April 23rd the Company paid to a representative of the United States a further sum sufficient to pay the amount of the alleged costs and expenses then due, making with the prior payment a total of $825.94. On the same day this sum was paid under protest by a representative of the United States to the Tax Assessor and the United States took possession of the mules and shipped them to Los Angeles, where on April 26th they were delivered to the plaintiff in error. Later a refund of $225 was made by the assessor to the plaintiff in error because of a reduction in the tax rate.

During the time that the mules were in the custody of the United States they were properly fed, but they were used so negligently that their shoulders were bruised and their necks made sore, and on account thereof twenty-one of them were in such condition that plaintiff in error was not able to use them from the 26th day of April, 1913, until the 1st day of June, 1913.

While the mules were in the possession of the Tax Assessor "they did not receive sufficient food, and in fact were nearly starved." (Tr. fol. 169). While the mules were in the custody of the Assessor plaintiff in error sent a telegram to Schanck asking whether the mules were being properly fed, to which Schanck replied "mules being fed." When the mules were returned to the plaintiff in error they "were deteriorated in strength and flesh and were weak and emaciated and unfit for work." (Tr. fol. 173). Their condition was due to their bruised necks and sore shoulders and to their lack of food while in the possession of the Tax Assessor.

It is alleged in the petition (fifth cause of action), and is not denied in the answer, that the mules were returned in such condition that plaintiff in error was unable to use them from the 26th day of April, to and including the 31st day of May, 1913. The reasonable value of their use during that period at $10 per head per month would be $1154.34. That because of their condition plaintiff in error was obliged to, and did, expend upon the mules for care and feed and for veterinary services $1382.50, and that there was a permanent depreciation in value of the mules to the amount of $742.50. Defendant in error has not paid plaintiff in error the foregoing sums, nor any part of the same, nor any rental for the mules for the period from the 11th day of April to the 23rd day of April, 1913, while they were in the custody of the Tax Assessor, which would amount at said rate to $428.67, nor the sum paid to the Tax Assessor for feed and care of the mules during the time he had them, to-

wit: $388.80 (fifth cause of action); nor the amount of the tax paid under compulsion (seventh cause of action), which, after the deduction of the refund, charges for feed, etc., amounts to $212.14. The total of the foregoing items which plaintiff in error seeks to recover is $4386.55. The District Court awarded plaintiff $176.70, no part of which is included in the foregoing items. The United States paid monthly for the rental of the mules at the rate of ten dollars per head per month from the time they were taken from Los Angeles until they were returned there except for the period while they were in the possession of the Tax Assessor.

The foregoing statement of the case is based entirely on the findings of fact made by the District Court and on the allegations and admissions of the pleadings.

ASSIGNMENT OF ERRORS.

Plaintiff in error in connection with its petition for writ of error makes the following assignment of errors which it avers occurred upon the trial, proceedings and judgment in this cause, to-wit:

I.

The Court erred in its conclusions of law, and said conclusions are incorrect and erroneous and inconsistent with and not supported by the findings of fact.

II.

The Court erred in holding that the defendant was not

liable for injuries done to plaintiff's mules while said mules were in the actual possession of the defendant and in use by the defendant on the Mohave Indian Reservation.

III.

The Court erred in failing to award plaintiff damages for the injuries found by the Court to have been done to plaintiff's mules while said mules were in the actual possession of the defendant and in use by defendant on the Mohave Indian Reservation.

IV.

The Court erred in holding that the defendant was not liable for the injuries done to plaintiff's mules while said mules were in actual possession and custody of the County Assessor of Mohave County, Arizona.

V.

The Court erred in failing to award plaintiff damages for the injuries found by the Court to have been done to plaintiff's mules while said mules were in the actual possession and custody of the County Assessor of Mohave County, Arizona.

VI.

The Court erred in failing to award plaintiff any sum as rental for the mules while they were in the custody of the County Assessor of Mohave County, Arizona.

VII.

The Court erred in failing to award plaintiff any dam-

ages because of the amount plaintiff paid to the County Assessor of Mohave County, Arizona, for feed and transportation of feed and for care of the mules while they were in the custody of the County Assessor of said Mohave County, Arizona, and for the alleged tax.

VIII.

The Court erred in finding judgment for the plaintiff for only One Hundred Seventy-six & 70/100 Dollars ($176.70) and not for the damages suffered by plaintiff because of the injuries to the mules while in the actual possession of the defendant and in use by the defendant on Mohave Indian Reservation and while in possession of the County Assessor of Mohave County, Arizona, and said judgment is inconsistent with the findings of fact and with defendant's admissions in the pleadings.

ARGUMENT.

The position of the plaintiff in error rests on two principal contentions:

First. That the United States were bailees of the mules under an implied contract, and consequently were liable for any injuries to the mules while in their possession, which resulted from negligence on the part of the bailees, their servants or agents.

Second. That the United States, being the sovereign power, cannot shield themselves behind the County Assessor of Mohave County and say that because the Coun-

United States in fact, did make monthly payments to the Occidental Company at said rate beginning in February, 1913. (Tr. fol. 174, 175). In short, the United States became bailees or hirers of the mules.

A bailment may be founded on an implied contract.

Phelps v. People, 72 N. Y. 334;
Blake v. Campbell, 106 Mass. 115;
Burke v. Trevitt, 4 Fed. Cas. No. 2163.

The California Civil Code, Section 1928, provides:

"The hirer of a thing must use ordinary care for its preservation in safety and in good condition."

This code provision entered into and became a part of the implied contract under which the United States took and used the mules.

Canada So. Ry. Co. v. Gebhard, 109 U. S. 527;
Pignaz v. Burnett, 119 Cal. 157, 160.

The rule as to care was substantially the same at common law.

Hall v. Warner, 60 Barbour (N. Y.) 198.

Plaintiff's action was properly brought under the Tucker Act, for even in a case of conversion it is held that the bailor has an election and may sue in tort for the conversion or may sue in contract.

Crawford v. Burke, 195 U. S. 176, 194;
In Re Coe, 169 Fed. 1002;
Lehmann v. Schmidt, 87 Cal. 15;
Harms v. New York, 69 Misc. 315, 125 N. Y. S. 477;
Keith v. Booth Fisheries Co., 27 Del. 218, 227;
Bates v. Bigby, 123 Ga. 727;

Belmont Coal Co. v. Richter, 31 W. Vir. 858, 860, 8 S. E. 609.

In the last named case the court states the doctrine as follows:

> "In general it is optional with the plaintiff to declare against the bailee in form ex contractu for the breach of the express contract entered into by him, or of the promise implied from the act of bailment, or in tort for the breach of the duty which is by law impliedly cast on the bailee; but it seems that in whatever form he may frame his declaration the *action is still one of contract wherever the liability of the defendant in fact rises out of a contract.*"

There is a long line of cases in which it is held that the United States is liable on implied contracts.

Clark v. U. S., 95 U. S. 539;
Saloman's case, 19 Wall. 17;
U. S. v. Buffalo Pitts Co., 234 U. S. 228;
St. Louis Hay & Grain Co. v. U. S., 191 U. S. 159;
U. S. v. Berdan Fire Arms Mfg. Co., 156 U. S. 552;
U. S. v. Palmer, 128 U. S. 262;
U. S. v. Great Falls Mfg. Co., 112 U. S. 645;
U. S. v. Lynah, 188 U. S. 445;
Bostwick v. U. S., 94 U. S. 53;
Sorenson v. Lyle, 3 U. S. Dist. Ct. Hawaii, 291;
Dougherty v. U. S., 18 Ct. of Claims, 496;
Moran Bros. v. U. S., 39 Ct. of Claims, 486;
U. S. v. Andrews, 207 U. S. 229;
Crocker v. U. S., 240 U. S. 74.

In the case of Clark v. United States *supra,* the petitioner, who was the owner of a steam boat, entered into an oral contract with an officer of the quartermaster's department whereby the United States was to have the use of the steamboat for $150 per day and was to pay

for the steamboat if it should be wrecked while being used by the United States. The United States had the use of the steamboat for eight days when it was wrecked and totally destroyed. The petitioner sought to recover the rental and the value of the boat. The United States pleaded in defense the statute requiring such a contract to be in writing. The court held that while the statute was mandatory and not merely directory, and therefore the petitioner could not recover under the express contract, yet he could recover under an implied contract for a *quantum meruit.*

The Court said:

> "In the present case the implied contract is such as arises upon a simple bailment for hire, and the obligations of the parties are those which are incidental to such a bailment. The special contract, being void, the claimant is thrown back upon the rights which result from the implied contract. This will cast the loss of the vessel upon him. A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. . . . As negligence is not attributed to the employees of the government in this case, the loss of the vessel, as before stated, must fall on the owner. Of course the claimant is entitled to the full value of his vessel during the time it was in the hands of the government's agents."

In this case petitioner was allowed to recover upon an implied contract, although the petition contained no count on an implied contract.

In the case of Salomon v. United States, *supra,* a quartermaster received corn for the government and gave a receipt and voucher for the amount of the price. The

government used part of the corn and allowed the remainder to decay from exposure and neglect. The court held that irrespective of whether or not the contract was in compliance with the statute requiring such contracts to be in writing, there was an implied contract to pay for the value of all the grain. It is to be noted in this case that the government did not use all of the grain for which recovery was allowed, but that some of it decayed, and as to the portion that decayed it might be argued that the government had not received any benefit. Nevertheless it was held liable to pay for it.

In the case of United States v. Buffalo Pitts Co., *supra,* the United States took over certain machinery in the possession of a contractor who was engaged in reclamation work for the government and who failed to carry out his contract. Included in this machinery was a traction engine upon which the Buffalo Pitts Co. held a mortgage. The conditions of the mortgage having been broken the plaintiff demanded of the United States the return of the engine. This was refused. After the work had been finished the United States abandoned the traction engine and it was taken possession of by plaintiff. The court held that there was an implied contract on the part of the government to pay for the use of the engine during the time that the government had the use of it.

In United States v. Andrews, *supra,* defendant had entered into a contract with the United States for the sale of certain paper. The contract was not in writing. The paper was delivered to a carrier designated by the United States and shipped to a consignee of the United

States in the Philippine Islands. Part of the paper was lost, and part of it was damaged. The United States was held liable for the full value of the paper despite the fact that there was no written contract. The Supreme Court said that it was of no consequence that there was no contract in writing since the contract had been executed. This case, like Salomon's case, *supra,* shows that the liability of the United States does not turn on the question whether the United States has actually received benefit from the contract, since most of this paper when it reached the consignee was not usable, but turns on the question whether or not the contract had been executed.

We have shown that the relationship between the United States and the Occidental Company was a contractual one—that of hirer and letter, bailor and bailee —and that although the contract was implied it was binding upon the United States because executed. We now come to the question whether the obligations of the United States under said contract with respect to proper care of the property bailed were the same as those of an individual in similar circumstances. The trial court took the position that the injury to the mules while in the hands of the United States was the result of negligence on the part of the employees of the United States, and that the United States were not liable for damages caused by the negligence of their employees. Plaintiff in error contends that since the obligation is one that arose out of an implied contract the vital and determining fact is that the contract had been broken, and that it is of no consequence in determining the rights of the plaintiff in

error that the contract was broken through negligence on the part of employees of the United States. In other words, that the United States, no more than any other contracting party, can excuse the breach of their contractual obligation by saying that the breach occurred because someone in their employ was negligent.

The case of Bostwick v. United States, *supra,* was an appeal from the Court of Claims to the United States Supreme Court. One Lovett, of whose estate the plaintiff was administrator, accepted a written offer of a general in the United States army for the hiring by the United States of certain premises. The offer was contained in a letter. No lease was ever executed, and the United States agreed to nothing in express terms except to pay the rent at the rate of $500 a month for the term of one year. During the occupancy of the premises by the United States part of the buildings were destroyed by fire. Also trees and fences were in other ways destroyed and gravel and stone were carried away. Plaintiff sought among other things to recover damages for these various injuries. Mr. Chief Justice Waite delivered the opinion of the court and pointed out that in every lease, unless expressly excluded, there is an *implied obligation* on the part of the lessee so to use the property as not unnecessarily to injure it; that while there was no lease in form, nevertheless the contract followed by delivery of possession and occupation was equivalent for the purposes of the action to a lease duly executed. In relation to the destruction of the buildings by fire, the court decided that there was no liability on

the part of the United States, for the reason that there is no implied obligation in a lease which would make the tenant answerable for accidental damages and that in this case it had not been found, and was not claimed, that the premises were burned through the neglect of the United States. As to the destruction of the trees and fences and the taking and carrying away of gravel and stone, the court held the situation to be different. Referring to the contract under which the United States held the premises the court said:

> "As has been seen, that does not bind the United States to make good any loss which necessarily results from the use of the property, *but only such as results from the want of reasonable care in the use.* It binds them not to commit waste or suffer it to be committed. If they fail in this they fail in the performance of their contract and are answerable for that in the Court of Claims which has jurisdiction of 'all claims founded upon any contract, express or implied, with the government of the United States.' . . . *The implied obligation as to the manner of use is as much obligatory upon the United States as it would be if it had been expressed.* If there is failure to comply with the agreement in this particular it is a breach of the contract, for which the United States consent to be sued in the Court of Claims. *All depends upon the contract.* Without that jurisdiction does not include actions for damages by the army; with it damages contracted against may be recovered as for breach of contract."

The court found that the acts in relation to the trees, fences, etc., were voluntary waste and were within the prohibition of the implied agreement and remanded the cause to the Court of Claims for determination there of

the amount of damage. The opinion contains these significant statements:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

The line is clearly drawn in this case, as it was in the case of Clark v. United States, *supra,* between cases where damage occurs without any proof of negligence on the part of the United States and those cases where negligence is shown to be the cause of the damage. We have in the case at bar all the elements on which liability was predicated in the Bostwick case—violation of an implied obligation and negligence on the part of the United States which caused violation of the obligation, together with damage therefrom to plaintiff. Plaintiff in error contends that the rule laid down in the Bostwick case is determinative of its rights, and that under that rule it is entitled to recover for the injuries to the mules while in the actual possession of the United States.

The Bostwick case is clearly distinguishable from such cases as Juragua Iron Co. v. U. S., 212 U. S. 297, and Herrera v. U. S., 222 U. S. 558, in which cases property was seized or destroyed by agents of the United States in time of war and in which cases the Supreme Court points out that there was no element of contract. Also from such a case as Bigby v. U. S., 188 U. S. 400, where plaintiff sued under the Tucker Act to recover for injuries received through the negligent management of an elevator in a building of the United States by an employee

bruised shoulders and sore necks would be $285.75. Adding to this the rental charge, the total of these two sums is $523.05. Since each of the sums may be arrived at by simple mathematical calculation they should be added without further hearing in the District Court to the amount for which judgment was therein awarded to plaintiff in error.

II.

THE UNITED STATES ARE LIABLE FOR THE DAMAGES CAUSED BY THE TAKING AND DETENTION OF THE MULES BY THE TAX ASSESSOR.

The United States as bailees were bound to deliver the mules back into the hands of the Occidental Company at the corral in Los Angeles whence they took them. (Tr. fol. 151.) The Civil Code of California, Section 1953, provides as follows:

> "At the expiration of the term for which personal property is hired the hirer must return it to the letter at the place contemplated by the parties at the time of hiring; or if no particular place was so contemplated by them at the place at which it was at that time."

The bailment would not be terminated until the property had been so returned. For all injuries to the bailed property during the continuance of the bailment the bailee would be liable, unless excused by some set of facts recognized by the law as a valid excuse.

A bailee cannot turn over property of the bailor to a third person merely because that person is a creditor

of the bailor and desires to take and hold the property to enforce payment of his debt. The bailee can excuse his parting with possession of the property to other than the bailor only when it is taken from him under legal process. If the property is exempt from such process then the failure to deliver the property to the bailor cannot be excused on the ground that it has been taken away from the bailee under such process.

Kiff v. Old Colony &c. R. R. Co., 117 Mass 591; 19 Am. Rep. 429.

In this case the bailees plead as an excuse seizure and detention of the mules by the County Assessor of Mohave County for taxes. Even had the bailees in this case been ordinary individuals, they could not excuse their failure on such ground, and this is true for two reasons: (A) Because there was no legal tax assessed upon the mules; (B) Because even had there been a legal tax the seizure itself was unlawful.

A. The Mules Were Not Taxable in Arizona.

The mules were on the reservation during all the time they were within the boundaries of the State of Arizona excepting when they were in transit between the California state line and the reservation (Tr. fol. 160, 161.)

Property is ordinarily taxable at the residence of the owner, and the fact that it is temporarily within the boundaries of a state or in transit through a state does not give it situs for taxation in such state.

Ogilvie v. Crawford County, 7 Fed. 745;
Burlington Lumber Co. v. Willitts, 118 Ill. 559; 9 N. E. 254;

Brown County v. Standard Oil Co., 103 Ind. 302; 2 N. E. 758.

If the contention hereinafter set forth by plaintiff in error in relation to the non-taxability of the mules while on the reservation is correct, then the passing of the property between the California state line and the reservation through a portion of the territory over which the state of Arizona has jurisdiction would have the same legal effect, so far as the right to tax the property in Arizona is concerned, as if the property were passing from California through Arizona to another state.

While on the reservation and in use by the United States in its business for the benefit of the Indians the mules were exempt from taxation because of the provisions of the act of Congress under which Arizona received statehood and of the ordinance of the people of Arizona accepting statehood. The organic act (U. S. Stat. at Large Vol. 36, page 568) provides as follows:

> "Section 20, subdivision second: That the people inhabiting the said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States, or any prior sovereignty, and that until the title of such Indian or Indian Tribes shall have been extinguished *the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States;* that the lands and other property belonging to citizens of the United States residing without the said

State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State *upon lands, or property therein belonging to, or which may hereafter be acquired by the United States or reserved for its use;* but nothing herein or in the ordinance herein provided for shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian Reservation owned and held by an Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

The Constitution adopted by the people of Arizona contained the following provisions:

ARTICLE XX.

ORDINANCE.

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States, or any prior sovereignty, and that until the title of such Indian or Indian Tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Fifth. The lands and other property belonging to citizens of the United States shall never be taxed

> at a higher rate than the lands and other property situated in this state belonging to residents thereof, and no taxes shall be imposed by this State upon lands or property situated in this State belonging to or which may hereafter be acquired by the United States, or reserved for its use.

Plaintiff in error contends that the combination of facts existing in this case, even if no one of them in itself was sufficient to do so, was as a whole sufficient to render the mules exempt from taxation on the reservation. They were upon ungranted public lands, or upon lands owned or held by Indians, and under the provisions of the ordinance such lands remain under the absolute jurisdiction and control of the Congress of the United States. The mules were being used by the United States for their own purposes in the improvement of the reservation for the benefit of the Indians. They were, therefore, within the meaning of the ordinance "property reserved by the United States for its use," and the Organic Act and the Arizona Constitution provide that no tax shall be imposed by the state upon such property.

Plaintiff in error admits that property upon an Indian reservation may be taxable, under some circumstances, as for example cattle of a foreign corporation grazing upon such reservation (Thomas v. Gay, 169 U. S. 264; Truscott v. Hurlburt Co., 73 Fed. 60), and recognizes that the fact that the property was in the custody of the United States would not in itself exempt it from taxation by the state.

> Thompson v. Kentucky, 209 U. S. 340;
> Carstairs v. Cochran, 193 U. S. 10.

Here, however, we have a situation different from those discussed in the cases cited above. Here not only was the property on the Indian Reservation, as in the case of Thomas v. Gay and Truscott v. Hurlburt, &c., *supra,* but it was also in the custody of the United States; and not only was it in the custody of the United States as in the cases of Thompson v. Kentucky and Carstairs v. Cochran, *supra,* but it was also being used by the United States for its own purposes, to-wit: for the improvement of the Indian Reservation under an act of Congress providing therefor and was also being used directly for the benefit of the Indians themselves.

In the Truscott case it was suggested that owners of cattle might avoid taxation of the same by seeking an asylum on the Reservation, and it was suggested that the property in that case was taxable because it was under the protection of the state. We submit that in our case neither of those two reasons applies. Since the property was taken upon the reservation by the United States clearly the owner of the property was not thereby seeking a tax-exempt asylum for it, and since it was actually in the custody of the United States it could not be fairly said that it was under the protection of the state, but rather that it was under the protection of the federal government.

The cases cited, however, indicate that similar statehood ordinances to that of Arizona have received not a strict and literal, but an extremely liberal, interpretation whereby, despite the exclusive jurisdiction of Congress over the reservations, the states have been allowed

to tax certain property of persons not Indians and not being used for the benefit of the Indians upon such reservation. The clause exempting from such taxation property owned by the United States or "reserved for their use" interpreted with equal broadness and liberality would exempt from taxation property taken upon a reservation in Arizona by the United States and used there by them under the authority of an act of Congress in work for the Indians. The work of improving an Indian Reservation is a work of such direct benefit to the Indians that it is within the purview of the said provisions of the Arizona statehood ordinance, which was intended to confer special benefits upon the Indians, and the instrumentalities used in effecting it come properly within the exemption of that act. The situation existing in this case is one that touches the Indians much more closely than does a tax upon cattle grazing upon Indian lands. It may even have an important bearing on the question of whether or not the reservation would remain habitable by the Indians. If mules already taxed in California are to be taxed again in Arizona if taken there by the United States to work on the reservation, it might be more difficult for the Indians to secure necessary improvements upon the place that has been by law set apart for them as a habitation, and it might also be more expensive for the United States to make improvements thereon.

The Supreme Court of the United States has held that coal mined by a lessee of Indian lands is not subject to taxation by the state, because the lease is an instrumentality through which the United States is performing its duty to the Indians.

Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292.

It has also held that a lease by Indians of land upon an Indian reservation for the sole purpose of mining and producing petroleum and natural gas, could not be taken into consideration in fixing the amount for which the corporation holding the lease should be taxed. The court says that whatever the provisions of the state constitution may be "it cannot be permitted to relieve from the restraint upon the power of the state to tax property under the protection of the Federal Government. That the leases have the immunity of such protection we have decided."

Indian Oil Co. v. Oklahoma, 240 U. S. 522.

Plaintiff submits that there is no case reported in the books where a tax has been imposed under similar circumstances, nor any case that lays down a principle that would justify taxation by the state under circumstances such as these. Such taxation would tend to thwart one of the very purposes of the constitutional provision cited, to-wit: the free and unhampered use by the United States of any instrumentalities it may see fit to use for the improvement of Indian lands and the betterment of the living conditions of the Indians thereon.

B. The Seizure of the Mules was Illegal Because Not Made in Compliance with the Provisions of the Arizona Codes.

Arizona Civil Code, section 4872, provides as follows:

> The County Assessor in each of the several counties in this State, when he assesses the property of

> any person, firm, association, company or corporation, liable to taxation, not owning real estate within the county of sufficient value in the assessor's judgment to pay taxes on both the real and personal property of such person, firm, association, company or corporation, shall proceed immediately to collect the taxes on the personal property so assessed; provided, that personal property in transit or temporarily in a county shall not be assessed therein, but where the owner is domiciled, and if said owner shall neglect or refuse to pay such taxes, the assessor or his deputy shall seize sufficient of such personal property to satisfy the taxes and costs.

There is no other provision in the Arizona Code for seizure of property by the County Tax Assessor.

The taxes assessed upon the mules amounted to $415.14 (Tr. fol. 159). Even after the costs had accrued the tax, with interest and costs, amounted to only $825.94, of which $225 was thereafter refunded (Tr. fol. 167, 168). The value of the mules was not less than $100 per head (Tr. fol. 160). The provision of the Arizona Code quoted above would not under such circumstances authorize the seizure of more than ten head of mules, which would represent a value of $1000, yet the Assessor seized ninety-nine head, valued by the Assessor himself (Tr. fol. 160) at $9900. No protest was made by the person in charge of the mules for the United States on the ground that the amount of the property seized was excessive, nor indeed on any other ground; yet the code provision strictly limits the assessor to the seizure of "sufficient of such personal property to satisfy the taxes and costs." Moreover, the section quoted expressly provides that personal property in transit or temporarily in a county

shall not be assessed therein, but where the owner is domiciled. The United States, no more than any other bailee, can excuse themselves by pleading the illegal act of the assessor.

C. The County Assessor Could Not in Any Event Lawfully Deprive the United States of Possession.

This is the main contention of the plaintiff in error on this phase of the case. Contentions A and B are secondary. Should we be held to be wrong in both of those contentions we may still maintain this principal position. The United States hold the sovereign authority. They are supreme. The authority and rights of a state or a county, insofar as they conflict with those of the United States, are subordinate thereto. A state cannot interfere with, nor can it hinder the lawful activities, of the United States or of its officers or agents acting under constitutional authority or carrying out the requirements of an act of Congress.

We have this situation: The United States are sovereign; they are in possession of certain property and are bound by the terms of an implied contract to return that property to Los Angeles. The United States, being thus bound, the question is whether any subordinate authority may interfere with them in the performance of their contractual obligation and prevent the fulfillment thereof.

The attribute of sovereignty in the United States precludes the acquirement or enforcement against them of many rights that may be enforced against private individuals. Titles may not be acquired by a state against the United States by right of eminent domain.

U. S. v. Chicago, 7 Howard 185.

No foreclosure decree can be made against the United States as the owner or tenant of mortgaged premises.

Christian v. Atlantic &c. R. R. Co., 133 U. S. 233, 27 Cyc. 1548.

Adverse possession of land cannot be acquired against the United States.

Doran v. Central Pac. R. R. Co., 24 Cal. 246;
Gluckauf v. Reed, 22 Cal. 469.

An officer or agent of the United States is not subject to be sued as a garnishee in a state court.

Fischer v. Daudistal, 9 Fed. 145;
Buchanan v. Alexander, 4 Howard 20;
Harris v. Dennie, 3 Peters 292.

A state court cannot by mandamus compel an officer of the United States to perform any act in connection with his duties as such federal officer.

McClung v. Silliman, 19 U. S. 598.

A state court has no jurisdiction to enjoin an officer of the United States Army from doing work which he is commanded to do by his superior officer in the execution of an act of Congress.

In re Turner, 119 Fed. 231.

Even in criminal matters the state has no authority over a federal officer to punish him for an offense arising out of or in connection with the performance of his duties as a federal officer.

In re Nagle, 135 U. S. 1;
In re Waite, 81 Fed. 359.

In the Nagle case the California courts undertook to hold and try Nagle for murder because while acting as an escort of a United States Judge in going from one court to another, and in protecting the judge from an infuriated attorney in his court, Nagle killed the assailant. The United States Supreme Court held that the offense, if any, was one over which the California courts had no jurisdiction because it arose in the performance of Nagle's duty as an officer of the United States, and on habeas corpus proceedings Nagle was discharged.

In the Waite case it appeared that Waite held a commission from the commissioner of pensions for the purpose of investigating certain alleged fraudulent pretenses in connection with the granting of pensions. It was his duty to take evidence and examine into claims of fraud pertaining to pensions. While in the performance of that duty and thus taking evidence it was charged by the witness that Waite maliciously threatened to compel him to do an act against his will, which under the Iowa Statute is an indictable offense, and Waite was indicted in the state court for the alleged offense. On his trial he urged that in doing the things complained of he was in the performance of an official duty as a United States officer. He was convicted and the conviction was affirmed by the Iowa Supreme Court. Upon application by Waite to the United States District Court he was discharged on a writ of habeas corpus by Judge Shiras, and this judgment was affirmed by the United States

Circuit Court of Appeals and afterwards cited with approval by the Supreme Court of the United States.

The foregoing cases all rest upon the same principle, that it is absolutely beyond the power of the state, or its officers, to hinder or interfere with an officer or agent of the United States in the performance of his duties as such officer or agent. The purpose of the law is that the United States may be absolutely free and untrammeled in carrying on their activities. It is clear from the foregoing cases that the Arizona court would have had no power by any order it might make to compel the Superintendent of Irrigation to turn over the stock in question to the County Tax Assessor. Nor if in the performance of his duty as custodian of the stock and in preventing the County Assessor from seizing the same he had committed a breach of the peace would the Superintendent of Irrigation have been subject to criminal prosecution under the laws of the State of Arizona. This is true not only in relation to the Superintendent of Irrigation himself, but equally true as to any subordinates or agents of his acting in the premises in his behalf. Surely a county assessor cannot have power to compel the delivery of property where the courts themselves would have no authority.

There is, moreover, a case in some respects strikingly like our own case in which the United States Circuit Court of Appeals recognizes the rule that a county officer has no authority to take personal property on which a tax is due out of the possession of an agent of the United States. The case is:

U. S. v. Moses, 185 Fed. 90.

It is a writ of error in an action by the United States v. a sheriff of a county in South Dakota. The United States entered into a contract with the Widell Finley Company to do certain work on an irrigation project, under which contract the government was authorized in event of a default by the contractor to take possession of the machinery, tools, animals, etc., of the contractor and carry out the work. The contractor defaulted, and an officer of the United States took possession of the property involved in the action and used the same to complete the work, which work was completed on August 31, 1907. Meanwhile the property of the contractor had been assessed for taxation by the local authorities. When the work contracted for had been completed it was asserted by the United States officers that the contractor was indebted to the United States in the sum of $4500 for breach of contract, and the officer in charge of the work retained and used the property in further construction work, claiming the right to do so as an offset to the amount alleged to be due from the contractor as damages for breach of contract.

In October, 1907, the defendant sheriff seized the property under process duly issued for the collection of taxes assessed against the contractor, at which time the property was in possession of an engineer in charge of the irrigation project. The United States brought replevin. The Circuit Court rendered judgment for the defendant on the appeal. This judgment was affirmed, but in affirming it the Circuit Court of Appeals, after

stating that the United States had no right to possession of the property after the work was completed, said:

> "To render such seizure unlawful it must appear that the officer [of the United States] had a legal right to hold and retain possession of the said property for and on behalf of the United States. A mere claim of right in the government is not sufficient."

In our case the United States at the time of the seizure of the mules by the County Assessor were in lawful possession of them and had a contractual duty to perform in relation to them. They were bound to return the stock to the owner in Los Angeles. At the time of the seizure by the Assessor that contract had not been completed. The seizure was a flagrant interference by an officer of the state or county without even such color of sanction as a decision or order of a state court could give him, with the performance and fulfillment of a contract by the sovereign United States, made for the prosecution of work authorized by an act of Congress. The County Assessor therefor did not only what he had no right to do but what the law cannot contemplate that he had any power to do.

He had no power in legal theory to take property from the possession of his sovereign. It is not open to the United States to plead that he took it from them against their will. As a practical matter it does not appear that he had the actual physical force to take the property had any resistance been offered. It has been held that where the officer taking or seeking to take possession has no authority to do so the bailee

should offer such resistance to the taking of the property and should adopt such methods for retaking, if taken, as a prudent and intelligent man would if his own property were taken under a claim of right without legal process.

Morris Storage &c. Co. v. Wilkes, 1 Ga. App. 751, 58 S. E. 232;

Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294;

Bliven v. Hudson River R. R. Co., 35 Barbour 188, affirmed 36 N. Y. 403.

The very least that could be expected of the United States under these circumstances would be that if the person in charge of the mules from incompetence or lack of understanding of the rights of the parties, should allow the mules to be taken, then the United States marshal should immediately retake possession of them from the tax assessor. If for any imaginable reason that had not been feasible, still the United States should have promptly brought a replevin suit and in that way again secured possession of the property. The failure of the United States either to retain possession of the property, or once lost immediately to regain it, makes our case stand precisely the same as if the United States had voluntarily relinquished (and that is in fact practically the case, Tr. fol. 163, 164) the possession of the stock to a stranger who was absolutely without right or power to take it. Having thus voluntarily delivered the property to a third person they are liable to pay the damages suffered by plaintiff in error as a result thereof. Those damages are set forth

in the fifth and seventh causes of action. They consist of:

(1) The reasonable value of the use of the ninety-nine mules from April 10, the date of the seizure, to April 23rd, the date of their delivery back to the United States (the period from April 1st to 10th and that from April 23rd to April 26th has been paid for by the United States (Tr. fol. 175)). The rental value of one mule for this period of thirteen days at the rate of $10.00 per month would be $4.33, for the 99 mules $428.67.

(2) The loss of use of the 99 mules from the 26th day of April to and including the 31st day of May, 1913, during which time they were unfit for work because they had not been properly fed while in the possession of the Tax Assessor (Tr. fol. 57, 58, 59), allegations not denied in the answer (See also findings, Tr. fol. 173); the loss of the use of one mule for this period of 35 days, reckoned at $10.00 per month, would amount to $11.66; for 99 mules $1154.34.

(3) Feed and care of said mules during the period from April 26th to and including May 31st, 1913. These items are alleged in the petition (Tr. fol. 58, 59) to amount to $24.50 for veterinary services and $1358 for feed and care,—total $1382.50. These allegations are not denied in the answer.

(4) Permanent deterioration in value of the mules. This is alleged in the petition (Tr. fol. 61) to amount to $742.50. The allegation is not denied in the answer.

(5) Sums paid to the Assessor for feed and trans-

portation of feed for the mules and for care of them while in his custody. These charges are part of the $825.94 paid to the Assessor. (Tr. fol. 167). They are alleged in the petition (Tr. fol. 62, 63) and are not denied in the answer. These charges might be recovered on a somewhat different ground from the actual tax. One theory on which plaintiff in error should recover these is that the United States were bound to feed and care for the mules until they should be returned to the bailee, and since the United States failed to do so, and the bailor was obliged to pay for feed and care the amounts paid therefor are a proper charge against the bailee. They amount to $388.80.

(6) The amount of the tax, costs and expenses paid to the Assessor. (Seventh cause of action (Tr. fol. 69); Findings paragraph VIII (Tr. fol. 167.)) From this amount should be deducted the refund of $225.00 (Tr. fol. 168) and the items of expense set out in the next preceding paragraph of this brief, amounting to $388.80. These deductions leave a balance of $212.14.

The money for the tax was paid by plaintiff in error to the United States and by them paid to the Tax Assessor. (Tr. fol. 166, 167.) The payment by the plaintiff in error was not a voluntary payment but was made under compulsion. It was necessarily made in order to secure possession of the property and to avoid serious and perhaps irreparable loss through the sale of the property (Tr. fol. 166.) Such a payment could have been recovered by the party making it.

De Bow v. U. S., 11 Ct. Clms. 672, 678;

McTigue v. Supply Co., 20 Cal. App. 708;
Spain v. Talcott, 165 App. Div. 815; 152 N. Y. S. 611, 618;
U. S. Nickel Co. v. Barrett, 86 Misc. 337, 148 N. Y. S. 325, 328.

Since it was not a voluntary payment, but one which plaintiff in error was compelled to make because of the failure of the bailees to retain or regain possession of the mules, it was a part of the damages suffered by the plaintiff in error through the failure of bailees to fulfill their contractual obligations and may be recovered from them.

The total of the foregoing sums which plaintiff is entitled to recover under this phase of the case is $4308.95. All of them may be arrived at by simple mathematical calculation based on the figures supplied by the pleadings and findings of fact, and they should be added without further hearing in the District Court to the amount for which judgment was therein awarded to plaintiff in error.

It should be noted in this connection that while all of the mules "were deteriorated in strength and flesh and were weak and emaciated and unfit for work" when returned to the Occidental Company in Los Angeles (Tr. fol. 173), and as alleged in the petition (Tr. fol. 59), the plaintiff in error was deprived of the use of said mules on account of their said condition from the 26th day of April, to and including the 31st day of May, 1913, a statement which was not controverted in the answer, yet in addition thereto 21 of said mules were in such condition because of their sore shoulders and necks

that they were not fit for use during said period and plaintiff was not able to use them. (Tr. fol. 173.) As to the 21 mules therefore, plaintiff in error is in a position to recover under either or both of its main contentions, since they were unfit for work, both because of their treatment while in the hands of the United States and because of their treatment while in the hands of the tax assessor.

In this connection it should be stated that by stipulation of the parties the original answer stood as the answer to the engrossed amended petition.

Matters of fact admitted by pleadings require no findings and as to such facts pleadings in effect become part of findings.

> Kennedy etc. Co. v. S. S. Const. Co., 123 Cal. 584;
> Gregory v. Gregory, 102 Cal., 50;
> Giselman v. Starr, 106 Cal. 651, 659.

III.

UNLIQUIDATED DAMAGES.

Although plaintiff in error is not obliged to rely upon such a contention, there is strong ground for asserting that if it were not in a position to recover on a contract either expressed or implied, it would still be entitled to recover unliquidated damages. The statute gives the right of suit "for damages, liquidated or unliquidated, in cases not sounding in tort." Since the original taking of the animals in this case was with the consent of the plaintiff and was not a tortious act, whatever damages plaintiff is entitled to do not sount in tort.

U. S. v. Cornell Steamboat Co., 202 U. S. 184.

In that case a steamboat company sought to recover from the United States salvage on importation duties which had been paid on certain sugar on the ground that had the sugar been destroyed the United States would have refunded the duties to the importer. The Supreme Court said that petitioner's claim could not be said to arise from either an express or implied contract with the United States, "But the claim may be properly said to be one of unliquidated damages in a case 'not sounding in tort' in respect to which the party would be entitled to redress in a court of admiralty if the United States were suable."

IV.

MEASURE OF DAMAGES.

Plaintiff in error conceives the measure of damages to be:

For the failure to return the mules at the time required by the contract (i. e. for their detention in the hands of the Tax Collector), the value of the use of the mules during the time they were withheld, together with the payment necessary to secure their release; for the injury to the mules, the amount of the difference in value of the property before and after the injury, together with the value of the use of the property during the time that the mules were being put in condition to be used, and the amounts paid out during that time for their feed and care and to cure their injuries.

Rollins v. Bowman Cycle Co., 96 App. Div. (N. Y.) 365;

Baker, &c. Mfg. Co. v. Clayton, 40 Tex. Civ. App. 586, 90 S. W. 519;

Union Stone Co. v. Wilmington Transfer Co., 90 Atl. Rep. 407;

Dunbar &c. Dredging Co. v. Title Guaranty Co., 106 N. Y. S. 180;

Pierce v. Walton, 20 Ind. App. 66. 30 N. E. 309;

Pusey v. Webb, 2 Pennewills Delaware Rep. 490; 47 Atl. 701.

The eighth cause of action, however, was framed to meet the possibility of the contention on the part of defendant in error that the proper measure of damages, so far as expenditures for feed, care, depreciation and loss of use, after the return of the animals to plaintiff in error, were concerned, was merely the decreased value of the mules at the time of their return as compared with their value at the time of their delivery to defendant in error.

In said eighth cause of action damages are so pleaded and placed at the sum of $3960. This sum does not include the charge for the rental value of the mules during the time they were in the hands of the County Assessor, nor the amount paid him to secure the release of them.

CONCLUSION.

An examination of cases decided by the United States Supreme Court under the Tucker Act impresses one with the liberality which that Court has shown in interpreting that act in favor of claimants. Clark v.

United States, *supra,* in which the claimant was allowed to recover under an implied contract although he had not pleaded an implied contract, and U. S. v. Cornell Steamboat Co., *supra,* in which the claimant was allowed to recover salvage on importation duties although there was no law that would require the treasurer of the United States to refund such duties had the property been destroyed, illustrate the attitude of that court toward claimants under the act. The court seems to take the position that in all cases having a contractual basis where there has been a loss that ought in fair dealing and good morals to be borne by all the people of the United States rather than by an individual or a few individuals, judgment should be awarded against the United States for the amount of such claim. We contend that the claim of the plaintiff in error is such a claim. Without any fault whatever on its part it has suffered damage amounting to several thousand dollars. This damage ought not to fall upon it but upon the people of the United States as a whole, in whose behalf the contract under which the loss occurred was made and carried out. Fair dealing between the government and its citizens requires that plaintiff in error should be reimbursed for its loss.

Respectfully submitted,

M. M. MEYERS,
CHARLES E. DOW,
Attorneys for Plaintiff in Error.

2954

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Occidental Construction Company, a Corporation,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ALBERT SCHOONOVER,
United States Attorney;
GORDON LAWSON,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Occidental Construction Company, a Corporation,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

As stated by the plaintiff in error on page 1 of his brief, this action is brought under the provisions of the Tucker Act. Section 7 of that act provides—

> "That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts."
>
> U. S. Statutes at Large, p. 506, Sec. 7, of an Act of Congress March 3, 1887.

It is not necessary, therefore, that the defendant in error comment upon the statement of facts by the plaintiff in error, or make a like statement, as "The facts found by the trial court are in the nature of a special verdict and not reviewable in the Appellate Court. That court will only inquire whether the judgment below is supported by the facts thus found."

United States v. Chase, 155 U. S. 489;
District of Columbia v. Barnes, 197 U. S. 146;
Collier v. U. S., 173 U. S. 79;
Mahan v. United States, 14 Wall. 109.

Defendant in error believes that the findings of fact by the District Court is a full and concise statement of the case that needs no restatement.

ARGUMENT.

I.

It is very difficult to determine whether counsel for plaintiff in error in his brief predicates his argument upon the express contract, an implied contract, or both. The contract involved in the case at bar is required by statute to be in writing, and it is well settled that such statutes are mandatory and unenforcible, unless statutory requirements are met.

Revised Statutes U. S., Sec. 3744;
Clark v. U. S., 95 U. S. 539;
Oakley v. Goodnow, 118 U. S. 539;
St. Louis Hay etc. Co. v. U. S., 191 U. S. 159;
Bowe v. U. S., 42 Fed. 761, 781;
U. S. v. Anderson, 207 U. S. 229, 243.

The trial court has found [Tr. fols. 176, 177] that "Neither the said Schank nor the said Coultis had authority to make, execute or deliver the contracts set out in Exhibits 'A' and 'B' annexed to plaintiff's petition, nor either of them. There was no ratification of said written contracts, or either of them, on the part of the United States. There was no estoppel against the United States to deny the validity of such written contracts, or either of them."

If there be, therefore, any basis for the claims of the plaintiff in error, it must be outside the alleged written contract. Plaintiff in error refers to an implied contract.

First, considering the proposition of the plaintiff in error in his brief, pages 10 to 22, and covering the second and third assignments of errors: "United States are liable for injuries to mules, while mules were in their actual possession." [P. 10.] Where is the implied promise by the defendant in error to indemnify the plaintiff in error against the negligence of the agents and employees of the former?

It is, first of all, well established that the United States is not liable for the torts of its officers, agents and employees.

Bigby v. U. S., 188 U. S. 400;
Gibbons v. U. S., 75 U. S. 269;
Lanford v. U. S., 101 U. S. 341;
Hill v. U. S., 149 U. S. 593;
Robertson v. Sichel, 127 U. S. 507;
Schillenger v. U. S., 155 U. S. 163.

The reason for such a rule is well stated in Robertson v. Sichel, *supra,* at page 515:

> "The government itself is not responsible for the misfeasances or wrongs or negligence or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests."

Also in Bigby v. U. S., *supra,* at page 407, after discussing a long line of decisions:

> "It thus appears that the court has steadily adhered to the general rule, that without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasance or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the Act of 1887."

In the next place, defendant in error contends that there must be an express written consent before this liability can be created. As stated in Bigby v. U. S., *supra:* "Without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees." Revised Statutes of the United States, Sec. 3744, provides that such consent must be in writing.

Not only was there no express consent to waive tort liability, but there was also no implied consent. The

latter is construed from the surrounding facts, attending circumstances, relationship of the parties, etc. The plaintiff in error was informed by the agent of the defendant in error that he had no authority to contract as to the care of the mules. [Tr. fol. 154.] Plaintiff in error also knew that it was dealing with the United States Government and is presumed to know that the latter was exempt from tort liability. From these facts, where is the inference that there is any such implied consent as the plaintiff in error claims?

Plaintiff in error in his brief, at the bottom of page 16, contends that: "Since the obligation is one that arose out of an implied contract, the vital and determining fact is that the contract had been broken." And the defendant in error raises the query: What contract had been broken? From the facts as found by the trial court and from the relationship of the parties and the fact that the government is a party, defendant in error fails to see wherein the government consented to waive its exemption from tort liability, and agree to indemnify the plaintiff in error against the negligence of the defendant in error's agents and employees.

Plaintiff in error has cited, on page 13 of his brief, "A long line of cases, in which it is held that the United States is liable on implied contracts." Defendant in error has examined these cases very carefully, and can find no authority for the plaintiff in error's position that the United States is liable on an implied contract, for the negligence of its agents and employees.

Plaintiff in error, on pages 13 and 14 of his brief, seems to rely a great deal upon Clark v. United States, 95 U. S. 539, and quotes from that case. Defendant in error points out that Clark v. United States, as quoted by the plaintiff in error himself on page 14 of his brief, it is specifically stated: "As negligence is not attributed to the employees of the government in this case, the loss of the vessel, as before stated, must fall on the owner." It will thus be seen that the question of negligence was not before the court in Clark v. United States. That case merely decided that: The government was liable on a *quantum meruit;* in fact, all the citations of the plaintiff in error are to the point that the United States may be liable on an implied contract for a *quantum meruit* or *quantum valebat.* That is entirely different from holding the government liable on an implied contract for the negligence of its officers, agents and employees, especially in view of the facts that the government is exempt from such liability.

The plaintiff in error has also discussed at some length, on pages 17, 18 and 19 of his brief, Bostwick v. United States, 94 U. S. 53, and seems to rely almost entirely upon this case. Bostwick v. United States is not in point. The facts may be gathered at the bottom of page 65 of the case, *supra:*

> "The contract is one by which Mr. Lovett agreed to let, and the United States to hire the premises described, for the term of one year, with the privilege of three, at a rent of $500.00 a month, and without restriction as to the use to which the property might be put. The United

> States agreed to nothing in express terms, except to pay rent and hold for one year, but in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily injure it. * * * This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates."

Bostwick v. United States is distinguished from the case at bar in that there was no question raised as to the authority for making the contract, that there was an express contract of a tenancy at will, which is not required to be in writing, and not an implied contract, and that the relationship of the parties was landlord and tenant. Also the damages awarded were based upon a covenant not to commit waste.

The plaintiff in error further argues, at the bottom of page 20 of his brief, that: "The fact that the acts of negligence might in another view be regarded also as tortious, does not deprive the plaintiff in error of its remedy under the act. The primary obligation is contractual." And on page 12 of his brief plaintiff in error states that his action was properly brought under the Tucker Act: "For even in the case of conversion it is held that the bailor has an election and may sue in tort for the conversion or may sue in contract." And cites a number of cases. Defendant in error points out that in none of these cases was the United States a party; and also that, inasmuch as the United States is not liable for the torts of its agents

and employees, there can be no election of remedies or waiver of tort, because there is no liability upon the part of the government for a tort, and therefore nothing to elect.

II.

Plaintiff in error next contends in his brief, page 22, that: "The United States is liable for the damages caused by the taking and detention of the mules by the tax assessor," which covers the fourth, fifth, sixth and seventh assignments of error. In support of that proposition he argues (1) that, "The mules were not taxable in Arizona." (2) "The seizure of the mules was illegal, because not made in compliance with the provisions of the Arizona codes." (3) "The county assessor could not, in any event, lawfully deprive the United States of possession."

It is difficult to follow the argument of plaintiff in error. In his brief, page 26, he states that there is a combination of facts, each insufficient of itself, that exempts the mules from taxation. He also admits that there is authority for similar taxes and "Recognizes that the fact that the property was in the custody of the United States, would not in itself, exempt it from taxation by the state."

The mules in this case were taxable in Arizona.

> "There shall be levied annually, on the real and personal property within this state, a tax."
>
> Civil Code of Arizona, Sec. 4839;
>
> Sec. 1, Chap. 35, Laws of 1913.

"All property of every kind and nature whatsoever within the state, shall be subject to taxation."

Civil Code of Arizona, Sec. 4846;

Sec. 8, Chap. 35, Laws of 1913.

"The tax laws of Arizona include many goods, chattels, securities, etc., and all property of whatsoever kind and nature, whether tangible or intangible, included in the term 'real estate'."

Civil Code of Arizona, Sec. 4847.

"In respect to property which is of a tangible and corporeal nature, and so capable of having a *situs* of its own, the residence of its owner is generally immaterial, and the property is taxable where found: hence property of this character found within a given state is taxable by that state, notwithstanding the owner may be a non-resident or alien and not in any other way subject to the laws of the state."

37 Cyc. 799;

Minturn v. Hayes, 2 Cal. 590;

56 Amer. Dec. 366.

Uniformly so held in California, Colorado, Connecticut, Illinois, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Texas, Wisconsin, Federal Jurisdiction and Canada.

And if the property be within one state, it is immaterial that it is also taxed and the tax paid in the state of the residence of the owner.

37 Cyc. 801.

Uniformly so held in Connecticut, Kansas, Massachusetts, New Hampshire, Oklahoma and California.

In the next place, property in the possession of the government or being used by the government in which the government has no ownership, is subject to taxation by the local authorities.

U. S. v. Moses, 185 Fed. 90;
Thompson v. U. P. Railway Co., 76 U. S. 579;
U. P. Railway Co. v. Peniston, 85 U. S. 5;
Baltimore Ship Building Co. v. Baltimore, 195 U. S. 375;
Gromer v. Standard Dredging Co., 224 U. S. 362.

Next, as to whether or not the seizure of the mules by the county assessor in Arizona was illegal. Admitting for the sake of argument that this seizure was illegal, it would then be a trespass. Would the United States as a bailee, be liable for such trespass?

Sanford v. Kimball, 138 Amer. State Rep. 345, at page 346, expresses the law upon the above point:

> "In an action of negligence against a bailee, not a common carrier, the general burden to prove negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he ordinarily makes out a *prima facie* case, and it is then incumbent on the bailee to explain the cause of refusal, as by showing a loss by fire, theft or accident. It then devolves upon the plaintiff to show that such loss was due to the negligence of the bailee. The final burden is on the bailor to prove negligence, not on the bailee to prove due care. * * *

> "It was only incumbent upon the defendant to explain the circumstances and to give the reason why the horse was not returned to the plaintiff. He need go no further. This was done, and it then became the province of the jury, under proper instructions, to determine whether or not the defendant was negligent, either in connection with the injury or in its subsequent treatment."

We have the same situation in the case at bar. The mules were taken possession of by the assessor while in the custody of agents of the defendant in error. There is no finding of fact that the defendant in error was negligent in allowing this trespass—if it be a trespass, as the plaintiff in error assumes.

Officers of the government are not presumed to be negligent.

Clark v. U. S., 95 U. S. 539.

The seizure of the mules in this case, however, was entirely legal.

It is the duty of the assessor to seize personal property and sell the same for the purpose of paying all unpaid taxes thereon.

Sec. 4872, Civil Code of Arizona.

Property in the possession of a United States officer, especially after the completion of the work on which the property was used, is subject to seizure by said officers.

U. S. v. Moses, 185 Fed. 90.

In the next place, the plaintiff in error has taken a curious position in supporting his proposition, on page 31 of his brief, that: "The county assessor could not,

in any event, lawfully deprive the United States of possession"; and this is his main contention. In the first part of his brief, defendant in error contended that the United States could not invoke its sovereignty to escape liability for the negligence of its agents, and plaintiff in error now invokes that sovereignty to warrant a recovery on grounds that he admits would not exist as against an ordinary bailee.

The argument of the plaintiff in error on this point is best stated in his own words at the bottom of page 31 of his brief: "The attribute of sovereignty in the United States precludes the acquirement or reforcement against them of many rights that may be enforced against private individuals." Apparently, the plaintiff in error admits that the county assessor in the case at bar had a legal right to assess the property in dispute, but objects to its enforcement. He then cites a number of cases and discusses them at some length, to show the priority of federal jurisdiction. This argument and these cases are not in point. The question is, was there an implied contract that the government refused to surrender property in its possession that had been legally assessed and was legally subject to seizure thereunder? We cannot, by any stretch of the imagination, conceive that the defendant in error impliedly so promised.

On page 35 of his brief, plaintiff in error cites and discusses U. S. v. Moses, 185 Fed. 90. This case is squarely in point with the argument of the defendant in error and is here submitted as authority. The best statement may be obtained from the court's opinion on pages 92 and 93 of the case. The italics are ours.

"The property in question, at the time of the assessment, was owned exclusively by the Widell-Finley Company. The government of the United States had no ownership therein, and *the mere fact that the property was employed in the service of the government did not exempt it from taxation, in the absence of an act of Congress to that effect.*

"It is true that property in the lawful possession of the United States, and in which the United States has a property interest, may not be seized by any process issued under the authority of the state. In this case, however, *the United States had no property interest in the property in question. It had a right to the possession of said property under the terms of the contract before quoted until the work required to be done by the Widell-Finley Company was completed and no longer.* That work was completed, as stated, August 31, 1907. Its possession thereafter by Walter was for and on behalf of the Widell-Finley Company, and *the mere fact that Walter was an officer of the United States, and claimed that his possession was for and on behalf of the United States, did not prevent its seizure by the sheriff as aforesaid.* To render such seizure unlawful, it must appear that the officer had a legal right to hold and retain the possession of said property for and on behalf of the United States. A mere claim of right in the government is not sufficient."

This case conclusively establishes the legality of the tax and seizure of the property in the case at bar. Rather than raise a presumption that there is an implied obligation upon the part of the government to assert its sovereignty to defeat a legal tax and legal seizure thereunder, it apparently points the other way.

It then follows that the defendant in error is also not liable for the injuries to the mules while in the possession of the county assessor of Mohave county, Arizona.

The assignments of error, other than herein discussed, viz., 2-7 on pages 7-9 of plaintiff in error's brief, are general.

The judgment of the lower court is consistent with the findings of fact, and it is respectfully submitted that it be affirmed.

ALBERT SCHOONOVER,
United States Attorney;
GORDON LAWSON,
Assistant United States Attorney,
Attorneys for Defendant in Error.